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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 90

PEOPLE OF THE STATE OF ILLINOIS, EX REL. VASHTI McCOLLUM, APPELLANT,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED MAY 15, 1947.

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[fol. 1]

IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, A. D. 1946

PEOPLE OF THE STATE OF ILLINOIS, ex rel. VASHTI McCOLLUM, Plaintiff-Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, Defendants-Appellees,

and

ELMER C. BASH and ALICE J. BASH, and WANDA I. BASH, a Minor, by Elmer C. Bash, Her Father and Next Friend, Intervenors

Appeal from Circuit Court, Champaign County

Honorable Frank B. Leonard, Judge Presiding

Abstract of Record from Circuit Court of Champaign County—Filed September 19, 1946

PETITION FOR WRIT OF MANDAMUS—Filed June 11, 1945

To The Honorable Judges Of Said Court:

1. Your petitioner, Vashti McCollum, the relator and plaintiff, is a resident and taxpayer in Champaign School District Number 71 in Champaign County in the State of Illinois. She, her husband and children are all residents of said school district and are all citizens of the United States [fol. 2] and of the State of Illinois. She and her husband are joint owners of real estate in said school district, county and state, upon which real estate they pay, and for many years have been paying, taxes of much more than one hundred dollars annually. She submits this petition to this Honorable Court on behalf of herself and all other taxpayers similarily situated.

2. The relator adheres to the school of thought known as "Rationalism" including atheism, is not a believer in any religious creed or doctrine and accepts no part of any bible as true where such part is not in accord with reason. Her

views and understanding concerning religion are further set forth as those in the publication entitled, "Rationalism *vs.* Religious Education in the Public Schools," written by her father, Arthur G. Cromwell, and a copy of which is hereto attached, marked "Ex. A," and made a part hereof. It is her desire that her own children, while they are infants under her care and control, be educated in accord with her own beliefs and understanding concerning religions, gods and bibles, which beliefs and understanding *she* finds, of all, to be the most intellectual, scientific, practical and honest, and the most conducive to good character and good citizenship. She desires that none of her children be indoctrinated in their infancy, in any school or by any teacher, with any of the numerous fallacious and controversial religious creeds, theories or dogmas, or with religious beliefs adverse to her own, and that they may be free from religion and any exercise thereof; and she desires corresponding freedom and protection for all other parents, regardless of creed, or their religious or anti-religious beliefs.

[fol. 3] 3. There are now in full force and effect the following provisions of the Constitution of Illinois:

"The general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education." Const. of Ill., Art. VIII, Sec. 1.

"No person shall be deprived of life, liberty or property without due process of law." Const. of Ill., Art. II, Sec. 2.

4. Revenue for establishment, support, maintenance and operation of the schools in said school district is provided by taxes levied, pursuant to laws of the State of Illinois, upon property in said school district, and paid by taxpayers in the district, of which taxpayers relator is one, as aforesaid.

5. The defendant is the Board of Education in said Champaign School District Number 71. It is a corporate body, consisting of a president and six members, organized according to the laws of the State of Illinois.

6. In said school district sites for schoolhouses with necessary grounds have been bought and schoolhouses built thereon; and defendant has established and does support

and maintain free public schools in said houses and upon said grounds, and does repair and improve the schoolhouses and furnishes them with fixtures, furniture, apparatus, libraries, and fuel; and does employ and pay salaries to a superintendent and to principals, teachers and janitors for said schools.

7. A statute of Illinois, now in full force and effect, provides:

"Every person having custody or control of any child between the ages of seven and sixteen years, shall, annually cause such child to attend some public or private school for the entire time during which the public school in the [fol. 4] district wherein the pupil resides is in session: Provided, that in the following cases children shall not be required to attend the public schools:

"(a) Any child attending a private or parochial school * * *;

"(b) Any child who is physically or mentally unable to attend school, * * *;

"(c) Children over fourteen years of age, who are necessarily and lawfully employed, * * *;

"(d) Any child over twelve and under fourteen years of age during the hours while in attendance at confirmation classes.

* * * * * * *

"Any person * * * who shall fail to comply * * * shall be deemed guilty of a misdemeanor and shall be fined not less than five dollars * * *." Ill. Rev. Stat. 1939, Ch. 122, Sec. 301.

8. James Terry McCollum is the son of plaintiff, is ten years of age, is in the custody and under the control of plaintiff and resides with her and her husband in her home in said school district, county and state. He attends no private or parochial school. He is physically and mentally able to attend school, and plaintiff is compelled, by reason of the foregoing law, to cause him to attend one of the public schools.

9. The Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" Const. of the U. S., Amend. (I).

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny [fol. 5] to any person within its jurisdiction the equal protection of the laws." Const. of the U. S., Amend. XIV, Sec. 1.

10. The Constitution of Illinois, as now in full force and effect, provides:

"The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions; * * *. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship." Const. of Ill., Art. II, Sec. 3.

11. That in violation of said provisions of said Federal and State constitutions, instructors in religious education do come upon the school grounds and into the schoolhouses in said school district while public schools are in session, between the opening and closing of school and during the hours of regular, secular teaching and education of the pupils therein, at public expense, as aforesaid, and do then and there usurp and take over the use of said property for religious education of pupils who are assembled there for secular education, pursuant to the said law requiring compulsory school attendance, and the constitutional and statutory provisions for a good common school education for the children of the State of Illinois, as aforesaid, and do then and there for a period of thirty minutes oust the teaching of the secular education provided and required by law, and, in the place thereof, substitute instruction in religious education.

12. Said instructors in religious education do invade all, or nearly all, grade schools in said district, and the classrooms regularly used for instruction of pupils of certain [fol. 6] grades, including the 4th, 5th and 6th grades, in one of which schools and in one of which grades plaintiff's son, the said James Terry McCollum, is regularly enrolled and in attendance for secular education, as provided and required by law, as aforesaid. And said weekly invasion of each of said rooms does occur, and during the last past three years or more has occurred, regularly and steadily when schools are in session.

13. The 30-minute period of secular education lost each week is not later recovered, made up, or otherwise replaced or accounted for, but the loss is permanent. The said weekly period of time so usurped and used on the day of said religious education, is taken from a 30-minute period, which, on other days of the week, is used for secular education.

14. Pupils in each classroom so usurped and used for religious education, upon permission of their respective parents, are welcomed into the class in religious education and joyfully received by the instructor therein upon willingness to participate, regardless of the denominational affiliations or lack of affiliation of the parents of such young and indiscrimnate children. And the said instructor in religious education does give his or her instruction in a friendly and solicitous manner, and does make his or her lessons in religious education entertaining and fascinating to said young children, whereby said children may become attracted thereto, desirous of participating therein, and their interest and attention wrongfully diverted from their regular secular and lawful studies in said schools and children without parental permission to participate may harass and annoy their parents with requests for such permission; all with the ultimate intent, purpose and effect of establishing [fol. 7] in the young and indiscriminating minds of children of such credulous age a knowledge, interest and belief in a certain religion, god and bible as approved and taught by said instructor.

15. One of said instructors in religious education teaches a doctrine that there is a supernatural and divine being, person or thing, called "God"; that there is relationship

between mankind and said alleged God, whereby all earthly persons are dependent upon and responsible to said God. She also establishes in the minds of pupils a certain sectarian theory that said God is of masculine gender (by use of pronouns) and that said God and a female person named "Mary" (also known as the wife of Joseph) were the father and mother of a male child, called "Jesus Christ"; that thereafter the parents (then referred to as Joseph and Mary) fled with said child into Egypt until after the death of Herod; that said male child grew to manhood, and by reason of his relationship to and favoritism on the part of said God, he was endowed with miraculous, personal proclivities, but was ultimately killed by Jews, on Good Friday; that thereafter, on Easter Sunday, life was revived in his body, and he met, personally with some of his disciples, and he departed from them still living in said post mortem life.

16. Said instructor sometimes refers to said God by other names, such as "Lord" and "Jehovah." She teaches that said God once caused a great flood upon the earth, and thereby drowned many people and other dry-land animals but preserved couples of species by placing them in an ark which weathered the storm; that said God, pursuant to a covenant, favored certain persons, such as Abraham, Jacob and Joseph; that Jacob had a struggle with [fol. 8] an angel of God, which struggle said instructor interprets as a religious experience; that Adam and Eve were respectively, the first man and woman; that the Old Testament teaches of the "calling" of the Jewish nation; that Jacob had two wives, and that the offspring of such polygamy became God's chosen and preferred people; that Moses was associated with Jehovah; that God revealed himself to Moses through the medium of a burning bush; that God has the qualities of love and guidance; that God has performed supernatural and miraculous achievements in Egypt, and has shown signs and miracles to Pharaoh.

17. She teaches that by reliance upon God as a shepherd one may achieve freedom from want, by having pupils learn and recite such statements as: "The Lord is my shepherd, I shall not want."

18. She teaches that the Bible (King James version) is called the Christian's Guide Book, the Holy Writ and the

Word of God, by which teaching children may come to feel worshipful reverence for said book and regard it with higher esteem than other books.

19. She tells pupils, in substance, that ancient persons, called prophets, once lived, and, because of their affiliation with said God, they could foretell future events; that one, Isaiah, foretold the coming of Jesus Christ many years before the birth of Christ, thereby lending credence to the doctrine that devotion to God may pay unusual rewards; and that God actually did have some affiliation with the alleged Jesus Christ.

20. She also teaches the sectarian religious views that Jesus could be loved; that some angels gave a Christmas message to some shepherds; that Jesus was baptized in a river; that Jesus healed the sick (without teaching that [fol. 9] he used drugs or surgery); that he raised the dead by reviving life in deceased persons; that Jesus was a hero, and the main hero of the Bible; that persons other than Jesus have been known to heal the sick by Christ's methods; that the main theme of the Bible is Salvation; that the New Testament deals with a supposed "New Covenant" made possible by the life and death of Christ; that people owe a certain obedience to God; that certain persons have heard "calls" from God and have obeyed same; that children should perform ceremonies, called prayers, to said God; that there is power in faith and reward for prayers to said alleged God; that Jesus said "Whatsoever you ask the Father in my name he will give it to you"; that there is life again after death, and that persons may acquire everlasting life.

21. By practice and example she does refer to, copy and quote from the King James version of the Bible, whereby a practice of doing likewise may be established in the habits of pupils.

22. Said instructor in religious education conducts all classes in religious education in the classroom attended by plaintiff's son, James Terry McCollum, and in certain other classrooms in said schools. Said instructor is so employed for said teaching and instruction, and is compensated therefor, by Inter-Churchmen's Council, a voluntary and private organization and a religious establishment controlled by and composed mostly of members who are min-

isters of or interested in religion and desire promotion and advancement of certain churches and other religious establishments, and who, from and through some of their established churches, obtain contributions which are applied to the payment of the salary of said instructor. And said instructor is under the control and supervision of said [fol. 10] private organization of religious sponsors, and not the defendant.

23. And said instructor, a former missionary and a member of a large protestant religious denomination herself, does serve said religious sectarians, and their respective religious churches, by establishing in the minds of little, credulous children in said classrooms a great adoration, admiration, affection, reverence and deference for said alleged God, and causes them to honor and have sentiments of worship concerning said alleged God, and does teach and instill, into said children, faith in said God, and causes them to exercise worship through such faith in God.

24. By reason of the foregoing, an establishment of religion is grafted onto public school education, church and state become united in the classroom, worship is established in the lives of indiscriminating infants, religion is regimented, public education is controlled and censored privately by sectarians, and pupils are taught what to believe; and proselyting is practiced among little children of rationalists and humanists and of parents desirous of avoiding churches and religions, and of parents belonging to denominations too small to employ their own private teachers for said public schools; and public schools become fields for private missionaries and for rivalry of religious sects, public revenue is diverted to private use, taxpayers are not all affected alike, and many persons are denied equal protection of the laws, all contrary to the said 1st and 14th Amendments to the Constitution of the United States and to said provisions of the Constitution of Illinois.

25. When a pupil fails to participate in a class in religious education conducted in his regular classroom, he is [fol. 11] forced to surrender and is denied the use of such classroom for his instruction by his lawful teacher, employed and paid by defendant; and if he departs to the hallway, stairway or a substituted room to avoid said religious lesson, he is there deprived of the use of his regular desk

and other apparatus in his regular room; whereby, he is deprived of the use of such property without due process of law.

26. Although a pupil, by reason of the religious views of his parents, is excused from and leaves his classroom when religious education is taught to his class, he is compelled to attend and continue his secular studies in such place of religion and worship and there be present until the time religious instruction begins, before he leaves; or he must return and be present to resume his secular studies when it ends, or be present on both occasions. Such going and coming is extremely obvious and noticeable and may be understood by many as a gesture of disapproval of and contempt for the adult teacher of religious education, or it may incite curiosity about and invite unfavorable criticism and ridicule of the views of the victim's parents by a class of immature children who have not fully reached their age of reason, all to the embarrassment of said child.

27. If such child remains at his desk but does not participate in said religious education and worship his differences are nevertheless obvious and noticeable and he remains silent and unattended while fellow pupils around him are participating in exercises and receiving instruction and attention from the friendly instructor in religious education; and such segregation is thereby emphasized for one half hour.

28. In the said school attended by plaintiff's said child, [fol. 12] the majority or nearly all of the pupils in the 4th, 5th and 6th grades are enrolled in the religious education courses. When plaintiff's child was not enrolled with his classmates because of the views of his parents, and of his own, his religious difference was noticed by his classmates and their good will and esteem for him were injured; he was shunned by them and denied enjoyment of their society and friendship, and he was laughed at, hated, despised and looked upon with childish contempt by fellow pupils. Approval of the courses in religious education was supported mentally and morally by the influence and prestige of the adult instructor in religious education appearing in their midst and assuming authority and control of their classroom, all in the presence of and with the ostensible approval of his lawful, secular teacher. And no adult with

any such influence or prestige has been employed to appear, with regularity to sustain his views and those of plaintiff, and to expose the fallacies of the religious views and doctrines taught by said religious instructor.

29. By reason of said segregation, ostracism, ridicule, hostility and embarrassment, and the influence and prestige of said adult religious instructor and the desirability of obtaining her personal attention in the presence of other children, and by reason of other social pressures, all as aforesaid, the said child of plaintiff has been, within the past year, and yet is subjected to coercion and compulsion to seek plaintiff's permission and to participate in the religious education, and plaintiff, likewise, to grant permission, all in violation of their natural and constitutional rights to be free from religion and worship and from the exercise of either as provided by the 1st and 14th Amend-
[fol. 13] ments to the Constitution of the United States, and by the Constitution of Illinois, as aforesaid.

30. The Constitution of Illinois, as now in full force and effect, provides:

"Neither the general assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose." Const. of Ill., Art. VIII, Sec. 3.

31. The Statutes of Illinois, as now in full force and effect, provide:

"No county, city, town, township, school district or other public corporation shall make any appropriation, or pay from any school fund whatever, anything in aid of any church or sectarian purpose, or to support or sustain any school, academy, seminary, college, university or other literary or scientific institution controlled by any church or sectarian denomination whatever; nor shall any grant or donation of money, or other personal property, be made by

any such corporation to any church or for any sectarian purpose." Ill. Rev. Stat. 1943, Ch. 122, Sec. 286.

"The board of school directors shall be clothed with the following powers:

"Tenth—To have the control and supervision of all public school houses in their district, and to grant the temporary use of them, when not occupied by schools, for religious meetings and Sunday schools, for evening schools and literary societies, and for such other meetings as the directors [fol. 14] may deem proper; to grant the use of assembly halls and class rooms when not otherwise needed, including light, heat and attendants, for public lectures, concerts, and other educational and social interests, under such provisions and control as they may see fit to impose and to conduct, or provide for the conducting of recreational, social and civic activities in the school buildings under their control. Ill. Rev. Stat. 1943, Ch. 122, Sec. 123.

"The board of education shall have all the powers of school directors, is subject to the same limitations, * * *." Ill. Rev. Stat. 1939, Ch. 122, Sec. 136.

32. Not only does said instructor in religious education in said public schools exercise preference, by use, of the King James version of the Bible over the Douay version, but exercises preference likewise for said Christian, Protestant Bible over the Mohammedan Koran, the Zoroastrian Zend-Avesta, the Hindu Veda and all other ancient holy writs and sacred scriptures; and the Christian, Protestant creeds, doctrines and tenets, as relating to God (and Jesus Christ) are preferred over those as relating to Allah, Ormuzd, Brahma and the gods proclaimed by other religious sects in large denominations, all of which preference is in violation of said constitutional and statutory provisions herein referred to.

33. Said instructor does not teach all of said Christian, Protestant Bible, nor teach its pages in sequence nor its contents in chronological order, but chooses excerpts from their context, makes combinations of such selections according to her own preference and in accord with the approval of her said private sponsors, and teaches such selections to pupils, teaching in the light of her own sectarian views and training.

34. In particular, the said information so imparted by her may support the religious doctrines and tenets of one religious sect or another, or may be adverse to some doc-
[fol. 15] trine or theory which is religious or anti-religious.

35. She submits mimeographed groups of statements to pupils, directing each pupil to check the statement he thinks is correct in each group. Some call for selection among sectarian doctrines, such as follows:

"The most important value of the book of Genesis is: (a) scientific; (b) historical; (c) religious."

"The important lesson Abraham learned when he started to offer Isaac as a sacrifice to God was: (a) God does not require human sacrifice; (b) God cares for the innocent; (c) animal sacrifice is pleasing to God."

"The story of Jacob's dream shows this advance over the religion of the Canaanites: (a) God is thought of as the Father of all; (b) God is not tied down to one locality; (c) God is thought of as a God of justice."

36. And, teaching sectarian doctrines concerning "Faith", said instructor does distribute among pupils mimeographed outlines, containing controversial conclusions of a sectarian nature, including such as follows:

"Faith Saves Rahab—Joshua 2"
"Faith Conquers Jerico—Joshua 6"
"Faith Wins a Victory at Gibeon—Joshua 9, 10"
"Caleb Conquers Giants by Faith—Joshua 14, 15"
"Joshua, A Man of Faith—Joshua 23, 24"
"Deborah, A Woman of Faith—Judges 4, 5"
"Gideon, A Warrior of Faith—Judges 6, 7, 8"
"Ruth Chooses a Life of Faith—Ruth, Chapters 1-4"

37. Said instructor in religious education tells religious stories and causes children in her classes to tell and write [fol. 16] religious stories in their own words, all according to her own understanding of parts of said King James version of the Bible. She quotes selected passages from said Bible and makes comments and remarks concerning them. She includes in her religious teachings verses from sources other than the Bible, such as verses teaching children to say prayers. She teaches lessons on the subject of "Faith" by choosing and reorganizing passages taken from various parts of the Bible and then teaching her collection of excerpts to the children.

38. She conducts examinations in which she submits to her classes certain statements, the children to indicate whether they are true or false. The statements include such as follow:

"Samuel was known as a prophet of Jehovah."

"The Israelites took the Ark of the Covenant into battle because they thought Jehovah Himself dwelt therein."

"David was able to kill Goliath because he had the best armor and the best weapons."

"David's sin of taking Uriah's wife was condoned by Nathan, the prophet."

"Jeroboam allowed golden calves to be set up at the shrines in Dan and Bethel."

"Queen Jezebel was devoted to the religion of Jehovah."

"In Elijah's contest with the priests of Baal, Jehovah was victorious."

"Elijah was never discouraged or afraid what might happen to him."

"Elijah is said to have departed this world in a chariot of fire."

"One of Elijah's miracles was the healing of the Syrian King."

"Jeroboam, II enjoyed the longest and most prosperous reign of all the Kings of Israel."

[fol. 17] 39. A statute in full force and effect in Illinois now provides:

"The board of directors shall have the following additional duties:

* * * * * * *

"Seventh—to appoint all teachers and fix the amount of their salaries.

"Eighth—To direct what branches of study shall be taught, what textbooks and apparatus shall be used, and to enforce uniformity of textbooks in public schools; * * *

"Ninth—To establish and keep in operation for at least eight months in each year, and longer if practicable, a sufficient number of free schools for the accommodation of all persons in the district over the age of six and under the age of twenty-one years and to secure for all such persons the right and opportunity to an equal education in such school." Ill. Rev. Stat. 1943, Ch. 122, Sec. 122.

40. In violation of the foregoing, instructors in religious education are appointed for permanent and regular service in said public schools, and the amount of their salaries fixed, but not by the defendant; nor does the defendant determine what branches of study shall be taught, nor what textbooks shall be used, nor does it enforce uniformity of textbooks in said religious education in said public schools; nor does it secure for all children from six to twenty-one years of age the right and opportunity to an equal education, but provides education for children of parents of certain religious beliefs, and education according to such beliefs, but does not provide such opportunity to children of other religious beliefs nor to the children of atheists. The foregoing also violates the Federal and State constitutional provisions, providing for equal protection of the laws, as aforesaid.

[fol. 18] 41. In violation of said law, a Catholic priest does regularly give instruction in religious education in the junior high school in said school district, teaching religion to the children of parents of his own faith, and in doing so wears the garb characteristic of his religion; and said school board does aid and abet in such violation by furnishing a classroom and other facilities therefor.

42. There is in full force and effect in the State of Illinois a statute providing:

"No officer or employee of the State of Illinois, or of any political subdivision thereof, * * * shall deny or refuse to any person, on account of race, color or religion, the full and equal enjoyment of the accommodations, advantages, facilities or privileges of his office or services or of any of the property under his care." Ill. Rev. Stat. 1939, Ch. 38, Sec. 128k.

43. School houses and property in said school district are not equally available to plaintiff for teaching the anti-religious tenets of atheism and rationalism, or to unteach the teaching of said religious teachers; nor are they so available to certain small denominations, such as Jehovah's Witnesses.

44. There is now in full force and effect a statute in Illinois the provisions of which include the following:

"The religion or religious affiliation of any applicant seeking employment either as a superintendent, principal,

teacher or otherwise in the public grade or high schools of the State of Illinois, shall not be considered either as a qualification or a disqualification for any such employment." Ill. Rev. Stat. 1939, Ch. 122, Sec. 297a.

45. Atheists or rationalists are not employed to give instruction in religious education, and persons of the religious [fol. 19] faith of minority denominations are not so employed.

46. Certain cards used for obtaining permission of parents to have children take said religious instruction are prepared and distributed through the offices of the superintendent and through the hands of principals and teachers while engaged in their professional duties in said schools. The said school buildings, with light, heat and furniture and with janitor service, are furnished free of charge to said instructors in religious education and paid for with taxpayers' money (of which taxpayers plaintiff is one), whereby public funds are diverted to private use and taxpayers are deprived of their property without due process of law. And taxpayers are not affected all alike, but some, including the plaintiff, are denied equal protection of the laws; all in violation of the constitutional and statutory provisions aforesaid.

47. The schools of Champaign School District Number 71 are under the control and supervision of defendant, within whose power it is, and whose duty it is, to adopt and enforce all necessary rules and regulations for the management and government of said public schools as required by the statutes of Illinois, which are now in full force and effect and which now do provide:

"The board of directors shall have the following additional duties:

* * * * * * *

"Fifth—To adopt and enforce all necessary rules and regulations for the management and government of the public schools in their district." Ill. Rev. Stat. 1939, Ch. 122, Sec. 122.

48. Plaintiff has often protested to defendant, the superintendent and the teachers employed by it, against such [fol. 20] religious education; and the plaintiff did, on the 8th day of June, 1945, serve upon said defendant a demand in writing by delivering to both Mr. D. L. Huxtable, presi-

dent of said board, and Mrs. Ralph Kelly, secretary of same, in person in Champaign County, Illinois, a true and complete copy of said demand, a copy of which demand is as follows:

"Demand That Religious Education Be Prohibited in Public Schools

"Each and all of the undersigned, jointly and severally, hereby make demand upon the Board of Education of School District Number 71, Champaign County, Illinois, to immediately adopt and enforce rules and regulations prohibiting all instruction and all teaching in religious education in all public schools in Champaign School District 71, Champaign County, Illinois, and in all public school houses and buildings which are in Champaign School District 71, Champaign County, Illinois, when such houses or buildings are occupied by public schools; and prohibiting use in religious education of any public school classroom or assembly hall when otherwise needed; and prohibiting the teaching or conducting of courses, regularly or steadily, in any religious education in any school house or upon any school ground in said school district.

"Each of the undersigned likewise make further demand upon the said Board of Education that it withhold all school funds from payment of *anything* in aid of any church, sectarian or religious purpose, or in aid of any religious school in any public school building, where such religious school is controlled in any manner by any one or more churches, sectarian or religious denominations;

"And, likewise, demand is further made that said Board of Education do not donate or grant or permit the use of any personal property in any of said schools for any sectarian or religious purpose, or in respect to an establishment [fol. 21] of any religion of any kind, in any manner; and that said Board of Education withhold all school funds from payment of *anything* in support of any building or other place used in respect to an establishment of any religion of any kind.

Vashti McCollum, 1118 W. John St., Champaign, Ill.
Rev. Randall S. Hilton, Rev. Paul J. Folino, Rabbi Jacob J. Weinstein.

Robert S. Greenfield, *Chicago Action Council.* Ira Latimer, *Civil Liberties.*"

49. Yet the defendant has ever refused and failed, and yet does refuse and fail, to adopt or enforce any rule or regulation prohibiting instruction in religious education in said public schools, and has not in any other manner complied with said written demand.

Wherefore, petitioner prays this Honorable Court to issue a writ of mandamus to the Board of Education of School District Number 71, Champaign County, Illinois, ordering it to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools in Champaign School District Number 71, Champaign County, Illinois, and in all public school houses and buildings in said district when occupied by public schools.

Vashti McCollum, *Petitioner*, Landon L. Chapman, *Attorney for Petitioner.*

[fol. 22] *Duly sworn to by Vashti McCollum. Jurat omitted in printing.*

Exhibit A attached to complaint, being pamphlet entitled Rationalism *vs.* Religious Education in the Public Schools, by Arthur G. Cromwell.

EXHIBIT "A" TO PETITION

Religious worship is a chronic disease of the imagination contracted in childhood. Religionists know this; hence their determination to force religious training in the public schools while the plastic minds of our youth absorb readily and have no means of self-determination. Religion is a philosophy founded on ancient legend, stories, and human effort to attain aid from the supernatural. It is a metaphysical philosophy wherein man attempts to analyze and harmonize human existence with a questionable as well as an unknown future existence. It is an attempt to create celestial homes for mortals ruled by celestial gods.

Religion is born of fear, ignorance, and superstition. Back in the dim paleolithic ages when the human creature was emerging from the tree-climbing, tail-hanging ape, the germ of a reasoning brain began simultaneously to develop. It was then that imaginary gods, evil spirits, etc., began to assert their influence on the lives and habits of the ancient ancestors of the human race.

[fol. 23] From the first day that the first crook realized he could hoodwink a few credulous beings into believing he had some personal tie-up with an unknown deity, religion and its unscrupulous preachers have fought to perpetuate the racket that permitted them to prey upon the innocence and credulity of the masses. The sciences of astronomy, physics, mathematics, and geography were little known or understood, and the phenomena of electric storms, floods, eclipses, earthquakes, and the like seemed to our prehistoric ancestors like some curse from an almighty power. Likewise the fall of rain, the warm glow of the sun, and the plentiful returns from the fields led them to believe that this was a reward from another all-powerful being. The constant struggle in nature between the things that hurt the human animal and those that aid him led him to believe that the gods of good and evil were themselves in everlasting conflict.

Thus, in their ignorance, fear, and superstition, our early forebears created their heavens, hells, gods, and devils, and in time developed a worship of prayer and sacrifice to satisfy or appease the gods of good and evil. And in this insane desire to appease an impossible deity all the horrors known to man have been perpetrated.

So up from the ape, the cave dweller, and the man in the mud hut has the evolution of the human species progressed until today, in the twentieth century, man stands pre-eminent in the animal kingdom. Just in proportion as the human brain developed, so did man solve the problems that confronted him. He profited by his mistakes and gained courage by his successes. We of today are proud of our ancestry. We are proud of the efforts they made and the strife they withstood to perpetuate and advance the race. Likewise, we are holding in reverent respect their mythologies and other mistaken ideas.

But respect and appreciation for the past do not in any sense obligate us to continue making the same mistakes as our forefathers or to continue worshiping their im- [fol. 24] possible gods and devils. Advancement of the human race can only be had if each generation develops and puts forth new thoughts and new ideals.

Thus we come to the education of the youth of today. The problem of the education of the youth has always been a serious one and one that has caused much difference of opinion. Today, we seem especially anxious to do the best

we can for our youth, for they never faced a more serious and disheartening future than now.

Basically, the youth of today are just as natural and normal as in any preceding generation. The fault of conditions now existing and affecting our youth is of an economic, rather than a constitutional, nature for which they should in no way be blamed.

It is true that there is a great deal of crime and lawlessness in America today. It is true that there are many young men and boys in our penal institutions. It is true that something should be done in an attempt to curb this lawlessness and enhance the ideals of a better Americanism. The problem, is how shall we go about accomplishing this? It is idle to pretend to cure children of their vices if we do not begin by liberating them from their prejudices.

There are different schools of thought. One is that religion, this is, the Christian religion, is the cure-all. The other school is rationalism. Let us examine these two schools of thought and see if we can determine the proper course to follow to aid the youth of school age.

Christianity is put forth by the religious advocates as the foundation for the moral, ethical, sociological, and spiritual development of the youth.

Christianity is the present survival of an ancient mythology founded on the stories and traditions of the Jewish people. These are found in a book now known as the Bible. It tells of the supposed birth of the human race about six thousand years ago. This book is called by the Christians "The Word of God"; yet it is filled with stories of wars of [fol. 25] hate and extermination, legends, myths, rape, murder, love, passion, contradictions, and some philosophy.

The Bible contains so much that is bad, so little that is good, and little or nothing that is true that it seems impossible that anyone who has read and studied it would recommend it as fit for our youth to read, much less use as a moral inspiration. Some religious advocates recommend the Bible and religious training in the schools for the purpose of "character building." They further recommend that "the time is now ripe for a thorough discussion of the theory of the separation of the church and state." This fundamental American principle is not merely a "theory"; it is one of the most vital propositions in our American Constitution and one that has been the primary cause of our great advance among the nations of the world.

I do not disagree about a discussion of the question; I only ask that I, or some other rationalist, be given an opportunity to defend the founders of our country and the authors of our Constitution.

America was founded just at the time when Europe was emerging from the Dark Ages, and our forefathers were determined that America should be forever free from the religious strife that had thrown European civilization back into a morass of hate and murder. They were determined that neither Christianity nor any other religion should ever rule or gain a strangle hold on American government. So to this end was written in the Constitution the law of the separation of church and state. They know that religious instruction opposes the desire to search out all the truth of life, whereas the teaching of a moral code of ethics free from the entangling chains of creed and dogma permits and encourages the student to acquire the true value of the opinions and thoughts of the world.

I also have read much of the religious history of the world, not only the Christian, but the other dead and living religions that have moved the lives and imaginations of men. Inasmuch as it is the Christian religion with which we have to deal, I shall confine my discourse to that one alone. [fol. 26] In my reading and study of the Bible and the history of the Christian religion, I have found it impossible to reconcile my understanding of morality, justice, tolerance, and the better way of life with the teachings and precepts I have found therein.

There are so many professed Christians who have never read the Bible that it is my sincere recommendation that they take it off the parlor table, brush away the dust of neglect, and read it. Owning a Bible that is never read or studied does not constitute a proper knowledge of the Christian religion. Neither do the making of pious interpretations and the repetition of a few choice selections over and over through the ages constitute a working knowledge of the Bible.

Nowhere in the New Testament can be found an instance wherein Christ spoke a kind word for the home tie or womanhood,—no, not even, to his own mother. He had no respect for the relationship of the family circle, and he held in contempt the social philosophies of his time. We do find, however, in his own various philosophies, his utter

and intense hatred for those who disagreed with him. For example, Matt. 10, 14-15:

> "And whosoever shall not receive you, nor hear your words, when ye depart out of that house or city, shake off the dust of your feet. Verily I say unto you, it shall be more tolerable for the land of Sodom and Gomorrah in the day of judgment, than for that city."

And then to go on to the 21st verse:

> "And the brother shall deliver up the brother to death, and the father the child: and the children shall rise up against their parents, and cause them to be put to death."

And again in the 34th and 35th verses:

> "Think not that I am come to send peace on earth: I came not to send peace, but a sword. For I am come to set a man at variance against his father, and the [fol. 27] daughter against her mother, and the daughter-in-law against her mother-in-law."

And the 37th verse reads:

> "He that loveth father or mother more than me is not worthy of me; and he that loveth son or daughter more than me is not worthy of me."

Here is Christ's proposition to humanity if it wants everlasting life (Matt. 10, 29):

> "And everyone that hath forsaken houses, or breathren, or sisters, or father, or mother, or wife, or children, or lands, for my name's sake, shall receive a hundredfold, and shall inherit everlasting life."

Also, these same intolerant demands may be found in Luke 7, 51-53; Luke 14, 26. In Matt. 25, 41, we find the statement:

> "Then shall he say unto them on the left hand, depart from me, ye cursed, into everlasting fire, prepared for the devil and his angels."

Read over Luke 19, 27.

It is not possible to believe that the principles and attitude, hateful as well as selfish, of Christ as here indicated could ever tend to build a better character or a better American home. Ideals such as these tend only to intensify the tendencies of selfishness, hate, and intolerance. Nowhere in the language of the human race is there found a more terrible curse than quoted in Matt. 25, 41; and Luke 19, 27. There is nothing in this antisocial attitude of Christ's to move anyone to tolerance and understanding.

Moreover, is it not wise to teach or inculcate in the plastic minds of our youth the stories of myth, filth, murder, war, and hate that so liberally fill the Bible. I urge you to take up your Bible and follow the references herein made.

Is it possible for anyone to believe that the stories of casting out devils as told in the 5th Chapter of Mark is fit for our children to believe. Would it be wise for the teach-[fol. 28] ers in our public schools to read to their students the stories contained in the Bible for the purpose of example and character building? Do we want our children to believe that out of the five million children of Israel that left Egypt for the Promised Land only two reached their goal, and then nobody wanted them? They had wandered for forty years over the Sinai Desert, suffered every hardship, and in turn had murdered and destroyed. Would anyone want our youth to believe the climax of this whole miserable story as told in Judges 19, 24-25? Do we want our children to believe that God, after all His promises to His children, made a mess of the whole affair and saved only such a dispicable character as this last man of the Exodus from Egypt?

The Books of I and II Samuel would be unreadable in any self-respecting schoolhouse. Would the story of David's collecting two hundred foreskins (I Samuel 25-27) to show King Saul what a great warrior he was be conducive to better character building among our schoolboys? Would the operation performed, as recorded in I Kings, 21, 21, be fit reading and study material for our youth?

Is it possible that anyone would consider the stories of the many deceitful romances of David fit to be assimilated by the minds of the young? Would anyone want our youth to emulate the deathbed scene of David when they come to bid adieu to this life (I Kings 1-3)? Would it be wise even

to read such stuff in our public schools? What would happen if our beautiful girls of today were used as poor Abishag was? Then there is the romance of this girl with Adonijah and its termination by the murder of Adonijah by his brother Solomon so that both the fair maiden and the throne might be his to enjoy. And there is also the rape of Tamar by her own brother Ammon as told in II Samuel 13; the homosexual act in Genesis 38, 8-9; the story of Lot and his two daughters; and hundreds of such stories of filth that could only pollute the mind of anyone reading them, much less believing them.

[fol. 29] Who wants our children to believe that God commanded General Joshua to murder every living thing in some sixty-odd cities (Numbers 31, 17-18), leaving only the unmarried maidens to be raped by the soldiers? We rationalists ask, if God could make such commands, or even sanction such foul deeds, then what worse thing could be expected from the Ruler of Hell? Would anyone who has read and understood all these vile and vicious stories want them to be taught in the public schools as "The Word of God?" Would we want to think that the typical American home life was like that of the House of David?

In Leviticus 25, 45-50, it says that God commanded human slavery. Further on in the same book 27, 27-34, God is charged with commanding human sacrifice, and in Deuteronomy 28, 53, God is said to have commanded cannibalism! Further on in II Kings 6, 26-30, it is actually practiced! Would the reading and believing of all this be conducive to better citizenship and character building?

Is it possible that any student of architecture would take any stock in Solomon's descriptions of the "Graces of the Church" as told in his "Songs?" What would one think of, when walking into a public school classroom, he heard the teacher reading the 4th verse of the 5th Song? What would be apt to happen to the morals of the class if all eight Songs were taught to the class?

Would the religious advocate advise and urge that high school and college students learn and follow the alchemy of the Israelite High Priest of the Temple rather than the scientific discoveries and accomplishments of such men as Pasteur, Hooke, and Lavoisier? Would they insist that the astronomy of Joshua be taught in preference to that of Copernicus, Galileo, Bruno, Chamberlin, Einstein, and Jeans.

Would the religionists attempt to convince our students of today that the language and stories of the Old Testament and the epistles of the New were superior in quality, fact, physics, logic, history, philosophy, language, construction, [fol. 30] and moral guidance than the profound works of Shakespeare, Newton, Freud, Darwin, Virgil, Plato, or Omar?

Would they even suggest to our students of today that the efficacy of prayer will do more for the well-being of the human race than honest toil and intelligent planning? Only a religious fanatic would suggest that the value of prayers be taught to heal the sick and save the dying rather than medical and surgical skill.

Then there is the story of the birth of Christ. Is there a man in America today who would believe his wife had an immaculate conception just because she was with child and he knew he could not have been the parent of it? The two conflicting stories of how Mary came to have this first child is proof enough that somebody was mistaken when telling the story. Mary never denied or affirmed it, nor did her husband, Joseph, but there are two genealogies given for the purpose of proving that Christ *was* the legitimate son of both Mary and Joseph and extending back to David and Abraham,—this all for the purpose of proving that Christ, the first-born, was the legitimate heir to the Judean throne made great by the names of David and Solomon.

After reading over and studying the life and works of Christ, what conclusions are our youth likely to come to? Will they believe that He was born part God with a desire to create a new religion, or will they believe that He intended actually to re-establish the Jewish kingdom? When He was murdered (in one place the Bible says He was crucified, and in another that he was hanged to a tree) a placard was hung over his head calling Him the "King of the Jews." Also it was His political, rather than his theological activities that were charged against Him.

It is true that Christ said some nice and kind things. It is equally true that He said many hard, brutal, and unkind things. Which are our students to believe true? How can a good teacher, or God, have two such divergent philosophies? Can we even successfully prove that this [fol. 31] Christ ever did live? Would the fact prove of any moral or spiritual value if we could?

Have not our students the right to demand that if God wanted them to believe this Bible to be His word, He would have written it and kept it clear of all contradictions, filth, murder, and wars of hate that it now contains? With all the confused conditions that exist today, is it wise to add further to the chaos by studying and believing an ancient Jewish mythology?

And so we could go on and on through the Old and New Testaments showing and proving that the Bible is no fit book to be read or believed in by the youth in our public schools. Nowhere in the whole book is there a place where womanhood is properly respected. From the beginning, when Adam blamed his wife for an act that he must have first started, the Biblical characters have cursed and used their women as vassals, slaves, concubines, and servants. Shall we repeal woman suffrage in America so that we may adhere closer to the teachings of the Bible?

Do we want our young people to read and believe the story of the Immaculate Conception to the end that they, too, may think they can hold sexual intercourse in a promiscuous manner and expect to get away with it by calling the inevitable result an "Immaculate Conception?" Do we think that our children will believe that this sort of thing could happen any more truly two thousand years ago than it could now?

If Christ is to be looked upon as God, or the Son of God, or Holy Ghost, or all Three in One, how are our children going to reconcile the self-destruction of God? Are they going to believe this true, or are they going to look upon Christ as a religious fanatic who deliberately plotted His own death so that He might gain the crown of a hero and the halo of a martyr? Is it possible that the religious advocates approve the idea that our school children should believe God carried out His command of human sacrifice to the extent of killing His own Son? Do they want the debasing philosophy of the remission of sin through the suffering and [fol. 32] death of another to guide the lives and actions of our youth? Is it wholesome and character building to teach our youth that sin and wrongdoing may be squared with God and man through confession and faith?

Where is this ecclesiastical heaven the Christians talk so much about? Our students and their astronomical teachers have searched the universe far and wide, their telescopic search extending out into space in all directions

for billions of light years, and yet no sign of this present home of God and the future home of His chosen few has ever been found.

There are arguments put forth by some religionists that in order to place religious training and teaching in the public schools, there should be some sort of "common" religion that would satisfy the many various faiths and religions. The history of the world is filled with the stories of long, cruel wars fought for this very purpose, and all to no avail. There would have to be a lot of juggling before the Jew would accept Christianity or the Catholics and Protestants accept only the credentials of Abraham, Moses, David and Solomon.

There may be heard great cries from the supporters of religious training that the Rationalists select only the bad parts of the Bible and refuse to recognize the good. As Rationalists we insist on knowing what parts of the Bible would be taught and who would select these parts. We want to know how the Bible would make any sense or show any signs of coherence and continuity of thought if *all* the bad and contradictory parts were expurgated. If it were to be taught as the great Truth and Word of God, then surely we should insist that better proof of its validity be given. We should want to know why the worship of, and belief in, the Jewish God is any more right than the worship of any other gods of antiquity.

We should rather that our children believe in no god than that they be subjugated by a hideous monster in the skies that creates and kills His own children. We should [fol. 33] rather that our children live wholly independent of any religious teaching and die and go back into meaningless nothing forever than to dwell with a God that has made such a mess of human affairs as this Jewish God of the Christians. We do not want them to believe in any god that creates deformed and imbecile children just to have them suffer a lifetime of sorrow and misery. We do not want our children to believe in any god that makes playthings of his children and then gets angry and drowns, burns, or otherwise kills them because their finite minds cannot comprehend the fickle caprices of an infinite tyrant. We do not want our children to obey, or consider as true, any "Word of God" that has come to use in such an unwholesome and contradictory manner as has the Bible. We do not expect them to believe that any infinite God would trust His few

chosen Words and Commandments to a few impoverished Jews in the midst of the Sinai Desert. We do not expect them to believe that only one remained to tell the story, which, incidentally, he never did. We do not expect our children to believe that these Commandments came from any true and just God, for, according to Scripture, He, Himself soon broke them all except the first one.

To date, nothing has been so silent as the voice of God, and we can in no way accept this as proof that there is a God, and that we know His ways and Commandments. When this God makes His personal appearance, we shall be happy to be present and listen. Moreover, we are not going to permit any attempts to be made to force our children to believe in any robed hypocrite who may pretend to have the password and latchkey to the heaven of eternal bliss. Nor will we allow our children to be taught that any good and just God gave away his prerogative of pardon to any church or clergyman.

The very fact that in the years gone by various attempts have been made to inculcate religious teaching in the public school; all of which ended in hopeless disagreement among [fol. 34] the Christians themselves, proves that religion cannot be a truly impartial philosophy. The various Christian faiths and sects profess to believe in the same Bible and its Biblical characters, yet they hold almost a feeling of hate toward each other. When good Catholics can enter Methodist churches, or vice-versa, with the same attitude as they would when entering their own, then it will be possible for religion to become a movement toward better social conditions. When religious groups begin to lay aside their own political ambitions and unite to promote harmonious and constructive citizenship, then will they be qualified to build character. When creeds encourage the search for truth and facts, lead where it may, then may they assume some of the responsibilities of the education of our youth. When good Christians can debate political, social, and religious issues without resorting to innuendos, unkind personalities, and slanderous epithets, then will we believe them to be worthy of teaching our children a philosophy of moral ethics.

We Rationalists are opposed to the praying to or teasing any god or gods. All humanity desires peace on earth, good will toward man, yet the world has been, and is now, overrun with wars and hate. Where is this Christian God that permits all these diabolical things to happen? Why has He

done nothing to stop them? Why has He refused to stop the slaughter and enslavement? The Christian world has buried its very face in the mire, praying and teasing their God to stop war, pestilence, and crime, yet these things continue on until they run themselves out while this God remains silent. Why has this Christian God seemed to be more in cahoots with Hell and all its demons than He has with the sons of man who worship and adore Him and pay their last mite to His shrine? Why has this God remained so silent and aloof when all His own children are praying to Him for succor? Our children will not be satisfied with any hypocritical, pious guess. They insist on proof and demonstrated facts.

In their reading of the history of the world, our children [fol. 35] have come to know that one of the main causes of much of the suffering of the world has been the wars and persecutions resulting from religious hatreds. One of the most horrible periods of human history was that of the Dark Ages when Christianity was in supreme control and the soil of Europe was saturated with the blood of innocent millions. The light of human hope and progress was all but extinguished, and the blood of brave and honest Rationalists had to flow before the light was again visible and human progress was wrested from the cramped and hateful dogmas of the church.

Promoters of religious creeds have always resented intellectual development, progress, and invention, for only in the minds of the ignorant and credulous can religious dogmas exist. And just in proportion as man advances and acquires knowledge he throws off the hooded cloak of religious superstition. Yes, suffering man, has died like the Christ between two thieves, the despot on the throne and the church behind.

With the past so vividly remembered, we of today will never consent to have our lives or those of our children relegated back again into the hands and influence of the church and its dogmas. Organized religion has always resented the supremacy of demonstrated facts and is an avowed enemy of intellectual development; it is in no wise competent to assume any responsibility in the teaching of our young.

The teachers and preachers of organized religion should realize by now that it is a losing game for them to try to hold advancing humanity's respect for their metaphysical phi-

losophy. For twenty centuries they have been compelled to spend much time and effort apologizing and explaining the foul stories and contradictory tales in the Bible, yet these same things come back on them like a black cat.

It is our belief that many of the teachers and preachers of religion know and realize that this whole Jewish mythology should be thrown out as unworthy of Twentieth Century culture, yet they lack the moral courage to expose its [fol. 36] frauds and thereby lose their jobs. It seems strange that there are any people who would rather have a cruel and vengeful god than no god, or who would rather have a doubtful prospect of reaching a heaven of peace and rest, along with a big chance of going to Hell, than to have none at all. Will they not realize that if Heaven is tempting, as ignorant and credulous victims are willing to pay into the coffers of the church, the clergy will be found ready and willing to "take up the offering."

It must be realized that today's students in science, history, art, literature, astronomy, etc., are not going to accept the Bible and its impossible stories of ancient mythologies. The youth of today are fully aware that from the crude story of the Creation in Genesis to the fantastic tales in Revelations, there is no compromise with the known facts of life. They feel embarrassed when religious zealots attempt to put this book over as "The True Word of God."

Our students also know and understand the Laws of Cause and Effect, and they just will not thank someone else, even a god, for something that their labor and brains brought forth,—the Lord's Prayer notwithstanding.

Christians speak so freely of God and God's word. It is very doubtful if they have any better conception of all this than we have, and we admit that we have not the slightest. Nothing has been so silent as "The Voice of God," and we believe that if there were a God and He did have laws, they would be known and understood by all men and everything that lives. A true God would never rely on the fallacy of man to reveal, translate, interpret, and execute his Word.

Why has it been that God is so silent? Is it because God cannot talk, or is it because there is no God? If God is all-powerful, then why does He permit Hell to exist? If God has the power to do good and does not, then why pray? If God cannot or will not remove evil from the earth, then why should we presume to believe that the next existence

[fol. 37] will be any better if ruled by Him? Our children want the proof and facts regarding all these important matters before they accept them. From the material and circumstantial evidence we now have on hand, our students will never accept the religionist's idea of God or accept Him as the First Cause. Any book such as the Bible that is literally permeated with hate and intolerance will never be accepted as a proper guide for character building. Any God that damns a finite being to an infinite Hell will never gain the love and confidence of our youth of today.

We, as Rationalists, recommend and urge the establishment and construction of a moral code of ethics suited to the time and conditions in which we are now living. Place the old Jewish Bible on your library shelf along with the other writings of antiquity and revere it only for the story it has to tell of an ancient people. Let us revel in, and make use of, our reason which religion commands us not to listen to.

Let us write a Twentieth Century Bible today, and in it let there be only those things which we know to be true and those things that will inspire all alike to gain the heights of intellectual development. Let us stop telling our youth that if they sin, some God or Christ has died to square the account. Let us show that the philosophy of the remission of sin is degrading and immoral and that we, and we alone, must be held responsible for our deeds and misdeeds.

Let us stop trying to make our young people believe that if there is a God, he is a fickle, eccentric, selfish, unreasonable, and brutal monster somewhere in the skies that silently accepts our adulations yet drowns, burns, slays, and otherwise destroys his own created children. Let us forget prayer with closed eyes and depend upon keen vision and honest toil for success and happiness in this life. Insist that our young practice toleration rather than merely talk it. Insist that there no longer be the enshrouding of budding manhood and womanhood with the cloak of religious hypoc-
[fol. 38] risy. Encourage our youth to plunge into the open sea of human knowledge and gain for themselves the truths, facts, and accomplishments of the human race. Encourage their questioning so that their minds may be as free as the winged birds of the air. Encourage their questioning, whether their search leads to God or Atheism.

Let us no longer attempt to travel the intellectually paved highways of today in an old Jewish oxcart loaded with

the tales of myth, miracles, and magic. Let us stop believing in the supernatural, knowing as we do that all things happen in nature without malice and without mercy and that no laws of any god ever could have violated the natural laws which govern the universe. Miracles simply do not happen and the idea of the supernatural is but a contradiction in terms.

Let us realize that we cannot answer the natural questions of our youth by a conglomeration of ecclesiastical phrases that mean nothing, but only confuse and bewilder. Let us admit that the Oriental mysticism and ritual used today in the Christian churches are not satisfactory substitutes for truth, facts, and logic. Let us admit that beautiful songs written and sung for the glory of God do not in any sense prove the existence of God or the immortality of our souls.

Let us explode for all time the claim that what good there is on earth is due to religious influence and training. Let it be known to all men that it is the social laws that man has found it necessary to make to protect himself from the numerous evil forces that has caused civilization to advance, and not any religious creed or law. I is the effort and struggle man has made that has advanced civilization and intellectual development, and not gods, prayers, and faith.

Rationalists justly ask what faith Christians have in their God that prompts them to pray to Him asking that He "lead us not into temptation?" Do they suspect Him of further duplicity?

Yes, let us write a modern book of moral and spiritual ethics. Fill it with the stories of man's sublime courage [fol. 39] in his struggle toward the light Tell of the ever-upward and onward climb from out the depths that man has made so that we of today may enjoy the blessings of Liberty and Freedom! Tell of the romance of history, art, science, literature, astronomy, geology, and all other things that the human creature has experienced and that has made him the supreme being of the animal world. Tell the story of the great scientists, explorers, artists, inventors, mathematicians, philosophers, and teachers that have glorified the pages of history.

Disprove the stories in ancient Scripture which proclaim as existent such creatures as gods, angels, devils, cherubims, seraphims, witches, wizards, satyrs, pygargs, unicorns, fiery

and walking serpents, cockatrices, horses of fire, leviathans, behemoths, dragons, and a talking ass.

Boldly assert in this Twentieth Centry Bible of ours that such men as Thomas Edison and Charles Steinmetz have shed more light and given more health to the human race than all the prayers, myths, and inspired revelations contained in all the books of religion.

Have our book of today tell about all the great astronomical discoveries that have put to flight the tales in Genesis. With firm hand write in the geological history of this old world of ours, even though it destroys the Adam and Eve story. Teach in this book the immutable Laws of Cause and Effect so that man may better understand the value of work and the virtue of honest association with his fellow man. Teach in this book the philosophy of living one life at a time and doing that to the very best of man's ability. Keep always in mind the rights of others and the virtues of charity, justice, sincerity, and honor.

Inasmuch as we know so little of any future existence, let our Bible be kept free of metaphysics and all its hypothetical deductions and illusions. Let our book of today confine itself to only the known facts of life and this life only, teach-
[fol. 40] ing the philosophy of living one life at a time, and living it fully each day as it comes.

Teach the idiocy of war and the lasting hate it always generates. Forbid clergymen and the like to tease any God to bless or aid the arms of any human machine that is bent on the errand of destruction. Teach man to use his ingenuity to aid and prolong life rather than to destroy it. Teach the value of human kindness rather than a selfish worship of some unknown diety; it is so much more practical for human betterment.

Let this book contain unnumbered chapters of all the great literature of the world. Let it contain divergent political, social, and religious philosophies of both ancient and modern times. Do not permit the use of innuendoes, such as pagan, heathen, atheist, infidel, nonreligious, and irreligious for the purpose of discrediting an opponent when logic is lacking. Tell in this book of the many and varied gods and religions that man has believed in and worshiped in his advance toward civilization. Tell that for many thousands of years such great gods as Osiris, Isis, Horis, Jupiter, and Odin were worshiped by many millions of people that the Christians now in their egotism call pagans. Tell of the many

gods, christs, messiahs, and what-have-you that man has worshiped in his ignorance and fear and hope. Tell of all the other living religions of today that claim many millions of followers.

Explain how these ancient gods once ruled supreme and that to question them meant death. These gods and their religions are now dead because the people who made them powerful are dead. Jupiter no longer rules from high Olympus because the ancient Greeks are dead, and Jupiter died when his last worshiper died.

In our new Twentieth Century book of moral ethics, let it be known and understood that the only supreme being is in ourselves; that after all when we are, death is not, and that when death is, we cease to be. Let it be known that [fol. 41] life is of supreme importance to each of us, for without it there is no consciousness and the knowledge of our own existence would be impossible. The heritage of life comes to us through biological processes, and the instincts that form the motive power of our being are as old as life itself. It is the harmonizing of the instincts with one's own self and his environments, opportunities, and capabilities that this new bible will show and prove to be the proper road to character building and the better way of life.

This is the kind of bible our youth will accept. It will be a moral code of ethics that will harmonize the spontaneity of youth with the serious business of life. It will teach our youth to rely on fact and logic rather than faith and prayer. It will transform "God's Footstool" into the only realm or celestial spot where human life is known to exist. It will teach them that a practical life is more worthy of existence than a theological one and that credulity shall no longer be the victim of organized religion.

This code of ethics will enshrine the ideals of Liberty and Freedom in the hearts of every American citizen, and in this religion may be found all the requisites for the building up of the best in human nature.

Let us admit that it is not the depravity of our youth that is sending so many of them to the devil nowadays. It is the economic conditions in which we find ourselves. Until recently America had frontiers and there was plenty of room for expansion. Today we have reached and crowded our borders, and congestion is all too apparent. A generation ago we could secure a job any time we desired one. As chil-

dren we could play in the streets with safety, and around almost every corner was a vacant lot in which to play all the games our childhood enthusiasm could devise. We were always within calling distance of home, and the glorious sunshine was ours to enjoy. Our childhood freedom inspired John Greenleaf Whittier to write his immortal [fol. 42] "Barefoot Boy." Childhood life was free in those days, and youth developed accordingly.

Today, our youth finds itself in an entirely new environment and a different form of civilization. Our national frontiers are gone and with them the freedom of the street and vacant lot. Packed in three-, four,- and five-room houses and flats, our children are expected to expand. Living conditions are so crowded that they are forced out-of-doors, and there they find no place to go or play. They cannot play in the streets; it is too dangerous and it is against the law. They cannot go swimming in the canal or river; it is too dangerous and it is against the law. They cannot play in the city parks; they are only for grownups to play golf in, and there is little or no place for the young to swim except a swimming pool which is closed most of the time. What playgrounds there are are so distant and so far apart that they can only accommodate a few of the children in the immediate neighborhood. Swimming, bicycle-riding, roller-skating are limited, and ice skating is possible only a few hours of the entire winter and the rinks are few and far between. In fact, every movement of the youth of today is limited and cramped from the moment he leaves school until he returns the next day. There are no natural opportunities for normal expansion, and our youth resent the fact that we, their parents, do not demand more adequate facilities for recreation and play.

Yes, it is the regimentation and limitation of our youth today that are causing their unrest. Give them freedom to play and a chance to work, marry, and live normal lives and there will be no further cause to worry.

Build at least one large playground in every city ward. Build it with an outer ring of concrete for the older girls and boys to race around on their bicycles. Just inside this build another concrete ring for the younger children to roller-skate upon, ride their carts and tricycles. Inside this area build a commodious shelter house surrounded by play [fol. 43] lots for ball, quoit, croquet, tennis, wrestling, and all the other games which young folk like to indulge in.

Keep competent men and women on the grounds at all times to guide and teach the children new games and crafts. Keep the grounds open every day of the year and from early morning until late at night.

In the wintertime flood over the play area for skating, and in the shelter house arrange classes of occupational therapy and indoor winter games.

The question of expense is raised. Today we are spending two billion dollars per year to protect ourselves from the lawlessness so prevalent. War, generated from congestion and lack of proper human development, also costs many billions per year. Let us do away with the things which go to make criminals, rather than spend money trying to reform them. Let us build more playgrounds and fewer prisons. Let us spend our tax money in preventing the development of criminals by a philosophy of ethics and a system of recreation that will cause our youth to respond to our greatest expectations.

Also, we of the older generation should put our business conditions in better order so that our children will have work and opportunity. When we stop adding great financial debts for our children to pay, then will they in turn find their place in the sun. When we stop legislating and obligating their future, then will our children assume the responsibilities that are properly theirs. When we return to them the opportunity to play, work, marry, and live normal lives, then all our present-day social problems will disappear like dew before the morning sunshine.

A free and natural life makes for good and constructive existence; but when the spontaneity of youth is cramped by human congestion and an indifferent attitude of selfish social, financial, and political agencies, nothing but a parched existence can be expected. Open up the wells of freedom and opportunity to our youth and there will be no need to suggest the opening of a Holy (?) Bible.

[fol. 44] Religion never filled an empty belly, saved a drowning man, relieved any of us of toil, prevented sickness, or overcame the democracy of death, and it will never satisfy the natural yearnings of a youthful heart.

A little more common sense and effort and less religion on our part will help and be more appreciated by our youth. Let us sweep out the cobwebs of an old religion and its creeds and face the facts and problems of today with present-day ideals and practical methods. Let us recognize and

admit our faults and face our responsibilities with courage and common sense. Let Reason be our god, and Justice our determination; and with Love as our guide, we will lead, not only our youth, but ourselves, to a better citizenship and Americanism.

Summons issued June 11, 1945, with proof of service on reverse side thereof.

SPECIAL MOTION TO QUASH PETITION AND SUMMONS AND TO DISMISS THE PETITION, ON LIMITED APPEARANCE OF THE DEFENDANT—Filed June 18, 1945

Specially limiting its appearance for the sole purpose of making this motion, and reserving the right to file other motions, including a motion to dismiss or in the alternative to strike the Defendant, by John L. Franklin, its Attorney, hereby moves to quash the petition and summons herein, and to dismiss the petition, and as grounds therefor shows:

That the petition involves an alleged public right or rights of the petitioner, or in the alternative involves alleged public rights and alleged private rights of the petitioner; that said [fol. 45] alleged public rights may only be enforced upon application by the Attorney General or the State's Attorney, on behalf of the People of the State of Illinois, and not by a private relator represented only by a private attorney, and that the petition herein involved is not so signed by or applied for by the Attorney General, the State's Attorney, or any other legal officer of the State of Illinois, and that the Court therefore does not have jurisdiction to hear the same, and the summons issued thereon is void.

This Defendant further shows that it will be prejudiced by being required to defend this petition so presented on the relation of a private citizen, as an adjudication of the rights of the Defendant will not be binding upon the public generally, and the Defendant may be exposed to harassment by additional and like suits.

Therefore, the Defendant moves that the Court quash the petition and the summons herein, and dismiss said petition.

Order entered July 2, 1945, setting hearing for July 5, 1945.

ORDER OVERRULING SPECIAL MOTION TO QUASH AND DISMISS PETITION—July 5, 1945

Order entered July 5, 1945, overruling special motion to quash the petition and summons and to dismiss the petition; rule on defendant to plead by July 30, 1945, and hearing set for August 3, 1945.

Order entered August 2, 1945, vacating order for hearing on August 3, 1945, and extending time for defendant to plead to August 10, 1945; by agreement cause set for trial on merits September 10, 1945, and by agreement cause to be heard by Circuit Judges Frank B. Leonard, Grover W. Watson and Martin E. Morthland sitting en banc; further ordered that the decision of the majority of said judges is [fol. 46] to be the decision of the court on the questions of both law and fact.

ANSWER—Filed August 9, 1945

Comes now the defendant, Board of Education of School District Number 71, Champaign County, Illinois, and for answer to the petition for mandamus heretofore filed herein, says:

1. Without admitting the legal sufficiency of said petition or that the same states any legal grounds whatsoever for the relief therein prayed, the defendant admits that the relator and her child, James Terry McCollum, are residents of Champaign School District No. 71 in Champaign County, Illinois, and are citizens of the United States and of the State of Illinois; but it expressly denies that the relator is entitled to or does bring said action on behalf of all other taxpayers similarly situated and on the contrary affirmatively alleges that she is not entitled to bring this action on behalf of anyone other than herself and as to herself only as to such alleged private rights as may be set forth in her petition, if any such there are. Defendant alleges that neither the Attorney General of the State of Illinois nor the State's Attorney of Champaign County, Illinois, nor any other legal enforcement officer of the State of Illinois has authorized or joined in the application by the relator for a writ of mandamus and further alleges that in the absence thereof relator is not entitled to the aid of this Court in enforcing or procuring the protection of any alleged rights of herself and public generally.

2. The defendant neither admits nor denies that the relator is not a believer in any religious creed or doctrine, nor [fol. 47] that she accepts no part of any Bible as true where such part is not in accord with reason; and defendant neither admits nor denies that her views and understanding concerning religion are as set forth in the publication entitled "Rationalism vs. Religious Education in the Public Schools"; as to which matters the defendant alleges that it has no knowledge thereof sufficient to form a belief and therefore prays that the Court will require strict proof. The defendant is advised by the relator's petition and therefore admits that it is relator's "desire that her own children, while they are infants under her care and control, be educated in accord with her own beliefs and understanding concerning religions, gods and bibles, which beliefs and understanding she finds, of all, to be the most intellectual, scientific, practical and honest, and the most conducive to good character and citizenship," and also that relator "desires that none of her children be indoctrinated in their infancy, in any school or by any teacher, with any of the numerous fallacious and controversial religious creeds, theories or dogmas, or with religious beliefs adverse to her own, and that they may be free from religion and any exercise thereof; and she desires corresponding freedom and protection for all other parents, regardless of creed, or their religious or anti-religious beliefs"; but defendant denies that relator has any legal right to prevent her son, James Terry McCollum, who is of the age of ten years, from exercising his own right of religious freedom including the right to choose freely what, if any, religious beliefs he shall embrace.

3. Defendant admits that there are now in full force and effect the following provisions of the Constitution of the State of Illinois:

"The general assembly shall provide a thorough and [fol. 48] efficient system of free schools, whereby all children of this state may receive a good common school education." Art. VIII, Sec. 1.

"No person shall be deprived of life, liberty or property without due process of law." Art. II, Sec. 2;

but defendant denies that any of its acts referred to in the petition violates either of said constitutional provisions.

4. Defendant admits that revenue for the establishment, support, maintenance and operation of the schools in this school district is provided by taxes levied, pursuant to the laws of the State of Illinois, upon property in the school district and that such taxes are paid by taxpayers of the district.

5. Defendant admits that it is a corporate body consisting of a president and six members, organized according to the laws of the State of Illinois.

6. Defendant admits that sites for schoolhouses have been bought and schoolhouses have been built in this school district and that defendant has established and does repair and improve the schoolhouses and furnishes them with fixtures, furniture, apparatus, libraries and fuel, and does employ and pay salaries to a superintendent and principals and teachers for said schools.

7. Defendant admits that the Illinois Revised Statutes, 1939, Chapter 122, Par. 301, provide in part as follows, and that said statute is now in full force and effect:

"Every person having custody or control of any child between the ages of seven and sixteen years, shall, annually, cause such child to attend some public or private school for the entire time during which the public school in the district [fol. 49] wherein the pupil resides is in session; Provided, that in the following cases children shall not be required to attend the public schools:

"(a) Any child attending a private or parochial school * * *;

"(b) Any child who is physically or mentally unable to attend school, * * *;

"(c) Children over fourteen years of age, who are necessarily and lawfully employed, * * *;

"(d) Any child over twelve and under fourteen years of age during the hours while in attendance at confirmation classes.

"* * *

"Any person * * * who shall fail to comply * * * shall be deemed guilty of a misdemeanor and shall be fined not less than five dollars * * *."

but defendant denies that any of its acts referred to in the petition violates any of said statutory provisions.

8. Defendant admits that James Terry McCollum is the son of the relator, is of the age of ten years, and attends one of the public schools conducted by the defendant, and defendant alleges that said child is a normal child possessed of ordinary mental faculties and capable of making reasoned choices in matters concerning his religious training.

9. Defendant admits that the first amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

and that Section 1 of the fourteenth amendment to the Constitution of the United States provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein—which shall abridge [fol. 50] the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

but defendant denies that any of its acts referred to in the petition violates any of said constitutional provisions, and denies that any rights of the relator, guaranteed or protected by said provisions, are abridged by the defendant.

10. Defendant admits that Article II, Section 3 of the Constitution of the State of Illinois provides:

"The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political rights, privilege or capacity on account of his religious opinions; * * *. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."

but defendant denies that any of its acts referred to in the petition violates any of said constitutional provisions.

11. Defendant admits that instructors in religious education come upon the school grounds and into the school

houses in this school district between the opening and closing of the school day or session and while regular secular teaching and education of some of the pupils therein is being conducted, but it denies that said instructors in religious education then and there usurp and take over the use of the property of this school district for religious education of pupils who are assembled there for secular education and it denies that for a period of thirty minutes said instructors in religious education oust the teaching of the secular education and substitute therefor instruction in re- [fol. 51] ligious education. Defendant alleges that said instructors in religious education do not interrupt or interfere with the regular secular classes or instruction there, nor do they give instruction in religious education to pupils enrolled in the public schools during the required attendance of said pupils in the public schools or the classes thereof, but such instruction in religious education is given only to pupils who have been released, excused or dismissed from the public school and instruction therein for the purpose of attending said religious education classes.

12. Defendant admits that said instructors in religious education enter all of the grade schools in this district and certain classrooms sometimes used for instruction of pupils of the fourth, fifth and sixth grades, and that James Terry McCollum is regularly enrolled and in attendance in one of said schools. Defendant admits that said practice has been maintained for a period of approximately five years, but denies that such practice constitutes an invasion of said schools and alleges that the only classrooms which are so used in connection with religious instruction are ones which are not at such times in use in connection with or required to be used in connection with regular secular instruction.

13. Defendant denies that a thirty minute period or any other period of secular education is lost each week as a result of said classes in religious education and denies that there is any permanent loss or impairment of secular instruction of any of the pupils in this district as a result of said religious education courses, and defendant denies that the period used for such religious instruction would necessarily be devoted to secular education.

[fol. 52] 14. Defendant admits that pupils receiving permission of their parents to attend the classes in religious

education are welcomed into the class and received by the instructor regardless of the denominational affiliation or lack of affiliation of the parents of such pupils, and admits that the instructors in religious education do give their instruction in a friendly manner and do attempt to make the lessons in religious education interesting, entertaining and educational to said pupils, whereby said pupils may become attracted thereto and desirous of participating therein, but it denies that the interest and attention of the pupils are diverted from their regular secular studies in said schools. Defendant has no knowledge sufficient to form a belief whether children without parental permission to participate in said religious education classes may harass and annoy their parents with requests for permission and accordingly denies the same and demands strict proof thereof. Defendant denies that the acts of the religious education instructors or of this defendant have as their ultimate intent, purpose, or effect establishing in the young and indiscriminating minds of children of credulous age a knowledge, interest or belief in a certain religion, god or bible as approved and taught by said instructors. Defendant alleges that said religious education classes have been established and maintained in the public school buildings of this district for a period of approximately five years last past; that they have been solely under the control and jurisdiction of the Champaign Council of Religious Education which is a voluntary association made up of representatives of the Jewish, Roman Catholic and Protestant faiths in this school district; that during all of said period of time the defend- [fol. 53] ant has made available to said Religious Education Council and each and every faith represented thereby the free and equal use of certain rooms of the school buildings of said district while not otherwise in use for school purposes and for a period not to exceed in the case of any particular pupil 45 minutes in one week; that none of the books, materials and supplies used in connection with said courses is furnished to public expense; that pupils are admitted to said classes in religious education only upon the written request of their parents or guardians and then only to classes conducted by the faith designated by such parents or guardians; that at all times since the said religious education classes have been inaugurated the defendant has been willing to grant its permission for the similar free and equal use of rooms in its public school buildings when

not in use for school purposes to any faith or other group, if any there be, which desires to make use of the school-rooms belonging to the defendant for instruction in the tenets of belief or unbelief of such other faith or group; and defendant alleges that no resident of this school district, other than the relator, has ever objected to the religious education classes or to the action of the defendant in permitting said religious education classes to be conducted in the classrooms of the school district during the entire period since their inauguration.

15. Defendant denies that the matters alleged in paragraph 15 of the petition are taught in the manner and form set forth in said paragraph and specifically denies that any peoples are mentioned in connection with the story of the crucifixion of Christ or that any responsibility is fixed or referred to in connection therewith, but it admits that Bible [fol. 54] stories and quotations with reference to the birth, life and death of Christ are a part of said courses in religious education.

16. Defendant denies that the matters set forth in paragraph 16 of the petition are taught in the manner and form therein set forth or that any interpretation of the Bibilical material therein referred to is made by the instructor in religious education, but it admits that stories based upon the portions of the Bible therein referred to and quotations from the Bible are read and referred to in said classes.

17. The defendant denies that it is taught in said religious education classes that "by reliance upon God as a Shepherd one may achieve fredom from want", but admits that the Twenty-third Psalm therein referred to, as well as other psalms and Biblical quotations, are read to the pupils enrolled in said religious education classes and they are encouraged to memorize such of them as they desire.

18. Defendant denies that the Bible used or referred to in any of the classes in religious education is ever called or referred to in said classes as the "King James version", but it admits that the lesson materials used in said religious education classes sometimes refer to the Bible as the "Christian's Guide Book, the Holy Writ, and the Word of God". Defendant has no knowledge sufficient to form a belief and therefore neither admits nor denies that the effect of said references may be to cause pupils enrolled in

said classes "to feel worshipful reverence for said Book and regard it with higher esteem than other books".

19. Defendant denies that the matters set forth in Paragraph 19 of the petition are taught in the manner and form therein stated.

[fol. 55] 20. Defendant denies that the matters set forth in Paragraph 20 of the petition are taught in the manner and form therein set forth; it admits that stories and quotations from the Bible are read to and referred to in said religious education classes in which reference is made to the various portions and teachings of the Bible set forth in said paragraph, but it denies that any of said matters in said paragraph 20 contained are sectarian in their nature.

21. Defendant admits that the King James version of the Bible is used in the Protestant classes in religious education and that the same is referred to and quoted from in connection with the instruction in religious education, but it denies that said Bible is referred to in said classes as the "King James version".

22. Defendant admits that classes in religious education are taught in certain classrooms of the defendant including one in which James Terry McCollum procures a portion of his secular instruction; that certain instructors in religious education are paid by the said Champaign Council of Religious Education and that other of said instructors are paid by the respective religious organizations with which they are affiliated, such as the Roman Catholic and Jewish faiths.

23. Defendant admits that one of said instructors is a former missionary and a member of a large Protestant denomination, but it denies that she serves any particular denomination or that she teaches any sectarian doctrines or tenets of belief, and as to what is established in the minds of the pupils in said religious education classes by her [fol. 56] teaching the defendant is unable to say and therefore neither admits nor denies the same, but requires strict proof thereof.

24. Defendant denies the several conclusions contained in Paragraph 24 of the petition and specifically denies that by virtue of the religious education classes conducted in the public school buildings of the defendant "an establishment

of religion is grafted onto public school education, church and state become united in the classroom, worship is established in the lives of indiscriminating infants, religion is regimented, public education is controlled and censored privately by sectarians, and pupils are taught what to believe; and proselyting is practiced among little children of rationalists and humanists and of parents belonging to denominations too small to employ their own private teachers for said public schools; and public schools become fields for private missionaries and for rivalry of religious sects, public revenue is diverted to private use, taxpayers are not all affected alike, and many persons are denied equal protection of the laws". Defendant further denies that its acts in permitting the said religious education classes to be conducted in the public school buildings of the defendant are contrary either to the first or the fourteenth amendments to the Constitution of the United States and to the provisions of the Constitution of Illinois.

25. Defendant denies that any pupil in the public schools in said district is forced to surrender or is denied the use of a classroom for his instruction by his teacher employed by the defendant, and it further denies that any pupil is forced to depart to the hallway or stairway of any building while such religious education classes are being carried on, and it further denies that any pupil in said district is de-
[fol. 57] prived of the use of any of his property or apparatus, but the defendant alleges that none of the apparatus or desks or the schoolrooms in said district belong to or are the property of the pupils or any of them and that the pupils in said school district not participating in said religious education classes are, as are all other pupils in said school district, subject to the control and direction of this defendant and meet in different classrooms at different times for the purpose of taking different classroom work and that none of said pupils has any property right or interest in the particular classroom in which he may be engaged from time to time. Defendant further denies that any pupil is deprived of the use of his property without due process of law at any time by the defendant, as alleged in said paragraph.

26. Defendant admits that the pupils not participating in the religious education classes either leave the room in which such classes are scheduled during the period there-

of or that the pupils enrolled in said classes leave the room in which the pupils not enrolled are situated for the duration of such classes, but defendant denies that in this regard the practice with reference to religious education classes is any different than the practice with reference to regular secular classes taught in connection with the curriculum of the defendant or that there is anything more obvious about the movement of the pupils enrolled in the religious education classes than that of pupils enrolled in regular secular classes and the defendant further denies each and every of the conclusions set forth in paragraph 26 of the petition.

27. Defendant denies that any child enrolled in the public schools of this school district is required or compelled [fol. 58] to remain at his desk or in the room where religious education classes are conducted and it denies that any child, if any there be, who voluntarily remains is thereby made obvious or noticeable or left silent and unattended during such religious education classes.

28. Defendant admits that in the school attended by James Terry McCollum nearly all of the pupils in the fourth, fifth and sixth grades are enrolled in the religious education courses. Defendant has no knowledge, except as it is advised by the petition, of the views of the said James Terry McCollum or of his parents and demands strict proof thereof. Defendant denies that the alleged religious difference of James Terry McCollum was noticed by his classmates because of or on the occasion of his not being enrolled in the religious education classes or that because thereof their good will and esteem for him were injured, or that he was shunned by them and denied enjoyment of their society and friendship, and that he was laughed at, hated and despised or looked upon with childish contempt by fellow pupils, as alleged in said petition. Defendant further denies the conclusions in said paragraph contained, namely, that the approval of the courses in religious education was supported mentally and morally by the supposed influence and prestige of the adult instructor in religious education appearing in their midst and assuming authority and control of their classroom in the presence of and with the ostensible approval of the secular teacher, as alleged in said petition. Defendant admits that no person has been employed to sustain the alleged views of the relator

or to expose the alleged fallacies of the religious views and doctrines taught by any of the religious instructors in said religious education courses, but the defendant alleges [fol. 59] that it has never been requested to permit such teaching.

29. Defendant denies that the said James Terry McCollum has been subjected to segregation, ostracism, ridicule, hostility and embarrassment by reason of the existence of said religious education classes or his failure to participate therein, and defendant further denies that the influence and prestige of the adult religious education instructors or the desirability of obtaining their personal attention in the presence of other children has constituted any form of social pressure or coercion upon the said James Terry McCollum or that he has been subjected to any other social pressure because of said religious education classes either within or prior to the past year, or that he is yet subjected to coercion and compulsion to seek relator's permission to participate in the religious education courses, and defendant further denies that the relator has been thereby subjected to coercion to grant her permission for his enrollment in said religious education classes, or, in the alternative, defendant alleges that if the said James Terry McCollum or the relator or either of them have been subjected to any such coercion the defendant denies that the same was in violation of the natural or constitutional rights of either of them to be free from religious worship and from the exercise of either as provided by the first and fourteenth amendments to the Constitution of the United States and by the Constitution of Illinois, as alleged in said petition.

30. Defendant admits that Article VIII, Section 3, of the Constitution of Illinois provides:

"Neither the general assembly nor any county, city, town, township, school district, or other public corporation, [fol. 60] shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor personal property

ever be made be the state or any such public corporation, to any church, or for any sectarian purpose."

But defendant denies that any of its acts referred to in the petition violates said constitutional provision.

31. Defendant admits that there is now in full force and effect a certain statute of the State of Illinois providing in part as follows (Illinois R. S. 1943, Chap. 122, Par. 286):

"No county, city, town, township school district or other public corporation shall make any appropriation, or pay from any school fund whatever, anything in aid of any church or sectarian purpose, or to support or sustain any school, academy, seminary, college, university or other literary or scientific institution controlled by any church or sectarian denomination whatever; nor shall any grant or donation of money, or other personal property, be made by any such corporation to any church or for any sectarian purpose."

admits that there is now in full force and effect a certain statute of the State of Illinois providing in part as follows (Ill. R. S. 1943, Chap. 122, Par. 123):

"* * *

"Tenth—To have the control and supervision of all public school houses in their district, and to grant the temporary use of them, when not occupied by schools, for religious meetings and Sunday schools, for evening schools and literary societies, and for such other meetings as the directors may deem proper; to grant the use of assembly halls and class rooms when not otherwise needed, including light, heat and attendants, for public lectures, concerts, and [fol. 61] other educational and social interests, under such provisions and control as they may see fit to impose and to conduct, or provide for the conducting of recreational, social and civic activities in the school buildings under their control."

alleges that there is now in full force and effect a certain statute of the State of Illinois providing in part as follows (Ill. R. S. 1943, Chap. 122, Par. 136):

"The board of education has all the powers of school directors, is subject to the same limitations, * * *."

but denies that any of its acts referred to in the petition violates any of said constitutional or statutory provisions.

32. Defendant admits that the instructors in religious education classes attended by pupils who have expressed preference for Protestant religious education use the version of the Bible commonly known as the King James Version and that in the classes attended by pupils whose parents have expressed written preference for Roman Catholic religious education the instructor uses the form of Bible commonly referred to as the Douay, and that none of the instructors in said religious education classes uses the Mohammedan Koran, the Zoroastrian Zend-Avesta, the Hindu Veda, or any other form of holy writ or scriptures than those recognized by the Christian and Jewish faiths, and the defendant admits that the teachings of the Christian and Jewish faiths are preferred over those relating to Allah, Ormuzd, Brahma and the gods proclaimed by other sects not represented by adherents or believers residing within this school district, and the defendant alleges that no person or pupil residing in this school district, including the relator and her son, James Terry McCollum, has ever requested that the holy writs of any of said other religions or the teachings of any of said other prophets or [fol. 62] gods be taught in the religious education courses. Defendant further denies that the alleged preference so given to the Christian and Jewish religions is in violation of any constitutional or statutory provision whatever.

33. Defendant denies that the religious instructor for pupils whose parents indicate preference for Protestant religious training teaches pupils in the light of her own secular views and training.

34. Defendant denies that the information imparted in said religious education classes may or does support the religious doctrines and tenets of one religious sect or another, but admits that they are adverse to anti-religious doctrines or theories.

35. Defendant admits that said religious instructor submits mimeographed groups of statements to the pupils in the religious education classes, as alleged in paragraph 35 of the petition, but denies that such questions call for selection among sectarian doctrines.

36. Defendant admits that said religious instructor distributes mimeographed outlines concerning "Faith", as al-

leged in paragraph 36 of the petition, but denies that said outlines contain controversial questions of a sectarian nature.

37. Defendant admits that the instructor in religious education tells religous stories and causes the children in her class to tell and write religious stories in their own words, but denies that this is required to be done in accordance with the religious education instructor's understanding of parts of the King James version of the Bible. The defendant admits that said religious education instructor selects passages from the Bible, makes comments and remarks concerning them, includes in her teaching verses from sources [fol. 63] other than the Bible, and teaches lessons involving "Faith", and that this is done in part by choosing passages from various parts of the Bible and excerpts from her own collection of religious stories and verses.

38. Defendant admits that said religious education instructor conducts examinations in which she submits to her classes certain statements on which the children are to indicate whether such statements are true or false, such statements being as set forth in paragraph 37 of the petition.

39. Defendant admits that there is now in full force and effect a certain statute of the State of Illinois providing in part as follows (Ill. R. S. 1943, Chap. 122, Par. 122):

"The board of directors shall have the following additional duties:

"• • •

"Seventh—To appoint all teachers and fix the amount of their salaries • • •

"Eighth—To direct what brancnes of study shall be taught, what textbooks and apparatus shall be used, and to enforce uniformity of textbooks in the public schools; • • •

"Ninth—To establish and keep in operation for at least eight months in each year, and longer if practicable, a sufficient number of free schools for the accommodation of all persons in the district over the age of 6 and under the age of 21 years and to secure for all such persons the right and opportunity to an equal education in such schools."

but defendant denies that any of its acts referred to in the petition violates any of said statutory provisions.

40. The defendant admits that instructors in religious education are appointed for service in said religious education classes, the amount of their salaries fixed, but not by the [fol. 64] defendant, and that the defendant does not determine what branches of study shall be taught or what text books shall be used, nor does it enforce the uniformity of text books in said religious education courses, but it denies that said religious education classes are a part of the public schools or school curriculum or public school program, or that the same are under the jurisdiction or control of the defendant, and it denies that this defendant does not secure for all children 6 to 21 years of age the right and opportunity to an equal eduea-tion in schools provided by the district and denies that it provides education for children of parents of certain religious beliefs according to their beliefs but does not provide such opportunity to the children of other religious beliefs or to the children of atheists, but defendant alleges the fact to be that such instruction in religious education is controlled (under the supervision of the Champaign Council of Religious Education) by the various faiths participating in said religious education program, and the defendant further denies that any of its acts or omissions in regard to said religious education classes violates the Federal or State constitutional provisions providing for the equal protection of the laws, as alleged in said petition.

41. The defendant admits that a Catholic priest does regularly give instruction in religious education in the junior high school building in this school district and that he gives instruction in religious education to the children of parents of his own faith and only to such children, and in doing so wears the clerical collar and clerical vest characteristic of his and certain other religions, and that this defendant does furnish a classroom for the use of said Catholic priest and the pupils under his tutelage, but the defendant denies that it furnishes other facilities for such [fol. 65] use or that its action in permitting the use of said classroom constitutes aiding or abetting the violation of any law, and also denies that the garb or dress of said Catholic priest is, except as hereinbefore set forth, any different than other civilian dress.

42. Defendant admits that there is now in full force and effect a certain statute of the State of Illinois providing in part as follows (Ill. R. S. 1943, Chap. 38, Par. 128k):

"No officer or employee of the State of Illinois, or of any political subdivision thereof, * * * shall deny or refuse to any person, on account of race, color or religion, the full and equal enjoyment of the accommodations, advantages, facilities or privileges of his office or services or of any property under his care."

but defendant denies that any of its acts referred to in the petition violates any of said statutory provision.

43. Defendant denies that the schoolhouses and property in this school district and under its control are not equally available to the relator for the teaching of the anti-religious tenets of atheism and rationalism, or that they are not available to all denominations however small, including Jehovah's Witnesses, as complained of in said petition, but defendant alleges that the schoolhouses and property of said district are, in fact, equally available to all organized religious or anti-religious groups whose teachings are consistent with good public morals and the peace and safety of the people residing in said school district.

44. Defendant admits that there is now in full force and effect a certain statute of the State of Illinois providing in part as follows (Ill. R. S. 1943, Chap. 122, Par. 297a):

"The religion or religious affiliation of any applicant [fol. 66] seeking employment either as a superintendent, principal, teacher or otherwise in the public grade or high schools of the State of Illinois, shall not be considered either as a qualification or disqualification for any such employment."

but defendant denies that any of its acts referred to in the petition violates any of said statutory provision.

45. Defendant admits that atheists or rationalists are not employed to give instruction in religious education and that persons of the religious faith of some minority denominations are not employed by the faiths participating in said religious education courses, but the defendant alleges that many so-called minority denominations are represented among the pupils and the parents thereof who have volun-

tarily elected to participate in said religious education classes during the five years last past during which said religious education classes have been available in this district and that during the past school year thirty-one different faiths or denominations were so represented.

46. Defendant admits that certain cards used for obtaining permission of parents for their children to take said religious instruction are made available through the offices of the superintendent and through the hands of principals and teachers to the pupils of the school district, but defendant denies that said cards are prepared by or at the cost of the defendant or that the handling of said cards interferes with the duties or suspends the regular work of any of the employees of the defendant, but admits that certain rooms of the school buildings of the defendant are lighted and heated and furniture and janitor services therein are furnished while the religious education classes herein referred to are conducted and that no charge is made by the defendant to [fol. 67] any person or organization on account thereof, but the defendant alleges that whatever expense is incurred for said services, if any, would nevertheless be incurred whether or not said religious education classes were conducted in said rooms, and the defendant denies that any of the taxpayers' money or money of the relator or any public funds are diverted to private use or that the property of any taxpayer is thereby taken without due process of law; and the defendant further denies that as a result thereof all taxpayers are not affected alike or that some, including the relator, are denied the equal protection of the law, or that any of the acts or omissions of this defendant are in violation of the constitutional provisions and statutory provisions above referred to. Defendant further alleges that the defendant has never made any appropriation or paid from any public fund whatever anything in aid of any church or sectarian purpose, nor has it made any grant or donation of land, money or other personal property to any church or for any sectarian purpose.

47. Defendant admits that the schools of Champaign School District No. 71 are under its control and supervision and that it has the power and duty to adopt and enforce all necessary rules and regulations for the management and government of said public schools as required by Illinois

Revised Statutes 1939, Chapter 122, par. 122, which is in part as follows:

"The board of directors shall have the following additional duties:

"Fifth—To adopt and enforce all necessary rules and regulations for the management and government of the public schools in their district."

but defendant denies that it has any duty to adopt and enforce rules and regulations prohibiting the holding of religious education classes on released school time.

[fol. 68] 48. Defendant admits that the relator has heretofore on more than one occasion protested to the superintendent of schools of the defendant against such religious education and that she did on the 8th day of June, 1945, serve upon the defendant a demand in writing by delivering a copy thereof to both D. L. Huxtable, president of said board, and Mrs. Ralph Kelly, secretary of said board, in person, in Champaign County, Illinois, and that a true and complete copy of said demand is set forth in the petition herein.

49. Defendant admits that it has not complied with said written demand and that it does refuse to adopt or enforce any rule or regulation prohibiting the conduct of religious education courses in the public school buildings under its control during the time when pupils having written consent of their parents so to do are excused and dismissed from attendance at the public schools. Defendant further alleges that under the laws of the State of Illinois it has the power and discretion to determine the hours to be spent under the jurisdiction of the teaching staff of the defendant and for what purposes pupils may be excused from attendance at classes or study rooms.

50. Wherefore, defendant prays that this Honorable Court will dismiss the petition of the relator at her cost.

Affidavit

ORDER OF INTERVENTION—September 10, 1945

Order entered September 10, 1945, granting leave to Elmer C. Bash, Alice J. Bash and Wanda I. Bash, a minor, by Elmer C. Bash, her father and next friend, to file inter-

vening petition instanter as an answer to the petition for mandamus herein and making them parties defendant herein; the said intervening petition being on file, together [fol. 69] with the reply of the plaintiff thereto, and a stipulation for trial by three judges *en banc*.

Stipulation between the parties hereto, by their respective attorneys, admitting intervening petitioners as parties defendant, for leave to plaintiffs to answer said intervening petition, or in lieu thereof to have petition for mandamus stand as answer to said intervening petition.

INTERVENING PETITION—Filed September 10, 1945

Your petitioners, Elmer C. Bash and Alice J. Bash and Wanda I. Bash, a minor, by Elmer C. Bash, her father and next friend, by leave of Court first had and obtained, respectfully file this, their intervening petition, under oath and say that:

1. Your petitioner, Elmer C. Bash, is a citizen and taxpayer residing in School District Number 71, Champaign County, Illinois. Your petitioner, Alice J. Bash, is the wife of the petitioner, Elmer C. Bash, and is a citizen residing in said school district. Both are adults and are citizens of the State of Illinois and of the United States of America and are entitled to all of the rights of such citizens.

2. Your petitioners, Elmer C. Bash and Alice J. Bash, are the parents of two children, Shirley Lee Bash, age sixteen, and Wanda I. Bash, age thirteen; said children reside with your petitioners at 512 South Highland Avenue, Champaign, Illinois, and are within said school district and are citizens of the State of Illinois and of the United States of America and are entitled to all of the rights of such citizens.

3. The intervenors are members of the University Place [fol. 70] Christian Church of Champaign, Illinois, and are desirous that the two children mentioned above shall have the opportunity for religious education in the school buildings of the defendant, Board of Education of School District Number 71, Champaign, Illinois, under the supervision of the Champaign Council of Religious Education, being the course in religious education referred to in the petition of the relator, Vashti McCollum and in the answer of said defendant.

4. Said Shirley Lee Bash has taken religious education in the seventh and eighth grades of the school attended by her. Your petitioner, the said Wanda I. Bash, has taken the course in religious education in the sixth, seventh, and eighth grades and desires during the coming school year 1945-46 to take such work in the ninth grade on released school time, in accordance with the plan heretofore in operation and effect and under the supervision of the Champaign Council of Religious Education.

5. Your petitioners assert and each of them asserts that under Article II, Section 3 of the Constitution of the State of Illinois the said Wanda I. Bash is entitled freely to attend said course in religious education during the coming school year without interference from the relator or any persons whom she purports to represent and that the Court ought not to interfere with such right of said Wanda I. Bash. Said Constitutional provision is in part as follows:

"The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions; * * *. No person shall be required to attend or [fol. 71] support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."

6. Your petitioner, Wanda I. Bash, asserts that under Section 1 of the fourteenth amendment to the Constitution of the United States, she is entitled to continue the course in religious education during the coming school year without interference from the relator, the persons whom she purports to represent, or this Honorable Court. Said provision of the fourteenth amendment hereinabove referred to is as follows:

"All person, born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

7. Your petitioners are of the opinion that the well-being, education, and character of the petitioner, Wanda I. Bash will be benefited by a continuation by her in said course of religious education during the coming year. Petitioners assert hereby their rights under the Constitution of the State of Illinois and the Constitution of the United States to have the said Wanda I. Bash continue her study in the course of religious education during the coming school year without interference by the relator, the persons whom she purposes to represent, or this Honorable Court.

8. For answer to the petition of the relator heretofore filed herein, these petitioners adopt and reallege as fully [fol. 72] as though set forth in words and figures herein the answer of the defendant, Board of Education of School District Number 71, Champaign County, Illinois, heretofore, to-wit, on August 9, 1945, filed in this Court.

Wherefore, your petitioners pray that upon the filing of this intervening petition with the consent of this Court, that they shall be admitted into the above entitled cause as parties defendant thereto; that they may be represented by counsel who file this petition in their behalf on the trial of this cause and in all proceedings herein, and that after hearing this Court will dismiss the petition of the relator on the merits and at the cost of said relator.

Affidavit.

REPLY TO INTERVENING PETITION—Filed September 10, 1945

Vashti McCollum, the Relator, in reply to the intervening Petition of Elmer C. Bash and Alice J. Bash and Wanda I. Bash, a minor, by Elmer C. Bash, her father and next friend, says:

1. In reply to paragraph 3 of said intervening petition, the Relator neither admits nor denies that the intervenors are members of the University Place Christian Church of Champaign, Illinois, or any other church, or that they are desirous that the two children, Shirley Lee Bash or Wanda I. Bash, shall have the opportunity for religious education in the school buildings of the defendant, said Board of Education, or under the supervision of the Champaign Council of Religious Education, and that the Relator has insufficient knowledge concerning such matters upon which to form a

belief and therefore prays that the court will require strict proof concerning them.

[fol. 73] 2. In reply to paragraph 4 of said intervening petition, the Relator neither admits nor denies that the said Shirley Lee Bash has taken religious education in the sixth, seventh or eighth grades or that she desires during the coming school year 1945-46 to take such work in the ninth grade on released school time or any other time, or in accordance with any plan heretofore in operation or effect, or under the supervision of the Champaign Council of Religious Education, and has no knowledge sufficient to form a belief thereof, and prays for strict proof.

3. In reply to paragraphs 5 and 6 of said intervening petition, Relator denies that the said Wanda I. Bash is entitled to attend said course in religious education during the coming school year without interference, when such interference is proper and lawful, from the Relator or any persons whom she represents, and further denies that the court ought not to interfere with such alleged right of the said Wanda I. Bash, all for the reasons set forth in Relator's petition for mandamus filed in this proceeding.

4. In reply to paragraph 7 of said intervening petition, Relator neither admits nor denies that said intervening petitioners, or any of them, are of the opinion that the well-being, education or character of the petitioner, Wanda I. Bash, will be benefited by a continuation by her in said course of religious education or any other religious education course during the coming school year or any other school year, and has insufficient knowledge to form a belief thereupon, and prays strict proof; and Relator further denies that the intervening petitioners have any rights under the Constitutions of the State of Illinois or of the United States to have said Wanda I. Bash continue any [fol. 74] study in any course of religious education during the coming school year or any other year in the common and public schools.

Order entered September 10, 1945, granting leave to file instanter intervening petition as answer to petition for mandamus and granting plaintiff leave to file instanter her reply to said intervening petition.

Stipulation filed September 10, 1945, to have Judges Leonard, Watson and Morthland, judges of the Sixth Judicial Circuit of Illinois, sit *en banc*.

MOTION TO DISMISS PETITION, ETC.—Filed September 13, 1945

And now at the conclusion of the evidence of the plaintiff, comes the defendant, Board of Education of School District Number 71, Champaign County, Illinois, and moves that the Court dismiss the petition and complaint of the plaintiff and relator and as grounds therefor shows:

1. The evidence introduced by the plaintiff and relator affirmatively shows that no alleged private right is involved herein but only alleged public rights, which if they exist at all, exist in favor of the public generally or tax payers generally, and that said rights can only be enforced at the instance of the Attorney General or other law enforcement officer of the State of Illinois, or may only be enforced upon the application of such an officer to the court or by such an officer joining in or signing the petition seeking such relief and that no such officer has so joined in said petition, filed said petition or signed the same.

[fol. 75] 2. It now affirmatively appears that this is a moot case so far as the same concerns any alleged violations of the constitutional guarantees of the State of Illinois or of the United States with reference to freedom of religion or worship for the reason that the plaintiff and her son have affirmatively testified that they have no religion, do not believe in any God, and are atheists and further for the reason that the plaintiff and relator has stated that she has no objection to the participation of her said child in the religious education courses which are the subject of her petition and that she has no conscientious scruples against his participation therein and for the further reason that it affirmatively appears that the plaintiff and relator and her said son, James Terry McCollum, have not been interfered with, hindered, prevented from or embarrassed in their profession, practice or exercise of any religion or religious belief, and have not been coerced or caused to profess or worship or practice any religious belief or exercise and further, that they have not been embarrassed in connection therewith.

3. It affirmatively appears that the plaintiff and relator has voluntarily permitted and directed her said child, James Terry McCollum, to participate in said religious education classes and that she has thereby waived any

ground for complaint herein and is estopped from objecting thereto.

In the alternative, the defendant moves that the Court strike from the petition each and every of the allegations with reference to the subject matter set forth in paragraphs numbered 1, 2 and 3 above.

Order entered September 14, 1945, directing filing of briefs.

[fol. 76] Order entered September 14, 1945, adjoining court until the next regular term of court in course.

Placita.

Order entered November 9, 1945, extending time for filing brief of defendant and intervenor.

Order entered January 16, 1946, adjourning court until next regular term of court in course.

Placita.

OPINION—Filed January 26, 1946

By mandamus the relator, Vashti McCollum, a tax payer, and mother of James Terry McCollum, who attended school in the fifth grade at the Dr. Howard School, seeks to prohibit the teaching of religious education in the public schools of the defendant, School District Number 71, in the school houses and buildings in said district during the hours when said public schools are regularly in session. The defendant school district includes all the schools and school buildings in the City of Champaign, Illinois.

At the opening of the trial Elmer C. Bash, a citizen and tax payer residing in said school district, and Alice J. Bash, his wife, filed an intervening petition alleging that they are the parents of two children, Shirley and Wanda, who attend school in said school district, that they are members of the University Place Christian Church in this community. They allege that they desire the said courses in religious education complained of by the relator to continue, and allege that under the First and Fourteenth Amendments to the Constitution of the United States, and under the Constitution of the State of Illinois, they have the right to [fol. 77] direct the education of their children, and pray for the dismissal of the relator's petition.

There was no objection to the filing of this petition but the relator filed a reply thereto praying strict proof, denying that said children are entitled to attend the courses of religious education, and that they have any constitutional

rights as alleged in the intervening petition: The intervening petition will not be particularly referred to hereafter because the court is of the opinion the case can be disposed of on the complaint for mandamus and the answer thereto with the evidence heard in regard to the same.

By agreement the case was heard before the three judges of the Sixth Judicial Circuit sitting en banc. Evidence was heard for four days. Many of the allegations of the complaint are admitted by the answer, but there are some disputed questions of fact arising from the pleadings. Therefore, the court will make the following:

Findings of Fact

The relator, Vashti McCollum, is a resident and tax payer in said school district, where her minor son, James Terry McCollum, has been attending public school.

The testimony fully sustains the allegations in paragraph 2 of the complaint which have been by the defendant neither admitted nor denied, that Mrs. McCollum adheres to a school of thought known as "rationalism", including Atheism, is not a believer in any religious creed or doctrine, accepts no part of any Bible as true where such part is not in accord with proved scientific facts, and her views are as set forth in her father's publication entitled "Ration- [fol. 78] alism versus Religious Education in the Public Schools," a copy of which, marked Exhibit A, is attached to the petition.

She is compelled by the compulsory school law to send her son, James Terry McCollum, to the public schools of the defendant school district.

The overwhelming weight of the evidence shows, as set forth in the answer, that religious education classes were established and maintained in the public school buildings in the City of Champaign, Illinois, for about five years last past under arrangements made between the defendant school board and a group known as "The Champaign Council of Religious Education", a voluntary association made up of the representatives of the Jewish, Roman Catholic and Protestant faiths in the school district. The religious education council was founded and organized for the purpose of combating juvenile delinquency in the community, as well as to afford, if legally possible, an opportunity for children to study religious education on released time under

circumstances hereinafter detailed. The school authorities made available to this religious education council, and all of the faiths represented thereby the free and equal use of certain rooms in the school buildings while they were not otherwise used for school purposes during the regular school hours between nine a. m. and four p. m.

Paragraph 11 of the petition, denied by the answer, asserts that instructors in religious education usurped and took over the use of the said school property for religious education of pupils, and for a period of thirty minutes during the school day ousted the teaching of the secular education provided by law, and in place thereof substituted religious education.

[fol. 79] The court finds the facts to be that instructors in religious education who are not teachers or employees of the defendant school district, but who are selected and paid by the council of religious education, have secured permission to come into the several grade schools and into the junior high school of the defendant district; that between the hours of nine a. m. and four p. m., the regular school hours of the school children, those students who have obtained the written consent of their parents therefor are released by the school authorities from their secular work, and in the grade schools for a period of thirty minutes' instruction in each week during said school hours, and forty-five minutes during each week in the junior high school, receive training in religious education. In the grade schools such instruction in religious education was given in the fourth to sixth grades, inclusive, and in the junior high school, which includes what would ordinarily be called the seventh to ninth grades inclusive.

The facts show that in the grade schools the religious education teaching was done by a Miss Mae Chapin, a former Presbyterian missionary to China, and in the Philippines, where she taught mission schools. The other instructor in the grade schools was a Mrs. Jorgensen, a former public school teacher. Both of these religious education teachers are Protestants and teach Protestant classes. By arrangement with the defendant district they were given thirty minutes in each of the fourth, fifth and sixth grade classes in the grade schools once a week to teach religious education. In the junior high school and in certain grade schools the Catholic classes are held once a week. The record shows that formerly Jewish classes were held under

[fol. 80] the supervision of the Jewish Church, but that no classes have been held by the Jewish faith during the last couple of years.

In all of the schools the arrangements are about as follows: If a majority of the pupils in the class have signed up with their parents' consent to take religious education at the beginning of the class period the secular teacher leaves the room and takes with her the pupils whose parents have not requested such religious education, to an extra room where the students study under her supervision while religious education students pursue their studies under the religious education teacher. In the case of the relator's son, James Terry McCollum, who attended the fifth grade at the Dr. Howard School last year, in the first semester, only he and a boy named Elwin Miller did not sign up for the religious education courses. They left the room at nine o'clock in the morning and went to a music room to study, under the supervision of their secular teacher, Mrs. Bessie Taylor.

At the conclusion of the thirty-minute period they returned to their fifth grade class room, and with the remainder of their class studied their regular secular subjects. In those rooms where a majority of the students had not signed up for religious education, the religious education group left the room and went to a music room or other extra class room, and pursued their religious education studies in the same way, while the majority of those classes who did not take religious education remained under the supervision of their regular secular teacher preparing their lessons until the return of the group that had been excused to take the religious courses. In the second semester James Terry McCollum was the only child in his room [fol. 81] who did not take religious education. He went out to study alone, or attended another fifth grade class, as hereinafter more fully referred to.

What it all amounts to is that the pupils who take religious education use a thirty-minute study period which otherwise would have been devoted to study for recitation in their regular lessons; that on this released time they study religious education; while those who do not take religious education simply have a thirty-minute study period while waiting for the pupils in religious education classes to rejoin them for the regular secular studies. Occasionally the secular teacher remains in the religious

education class room but takes no part whatever in the religious education. Most of the time she is with the group who do not take religious education and supervises their study. At all times the secular teacher is supervising the study of those who do not take religious education.

It is undisputed in the pleadings that pupils receiving written permission of their parents to attend the classes in religious education are welcomed into the classes and are received by the instructor, regardless of denomination, affiliation, or lack of affiliation, of the parents of such pupils; that the instructors give their religious instruction in a friendly manner; that the pupils become attracted thereto and desire to participate therein. The evidence does not sustain relator's charge that the interest and attention of such pupils is wrongly diverted from their regular secular and lawful studies in the schools, but on the contrary, the evidence shows that the courses in religious education are similar to the extracurricular activities, such as music and art, which are taken with the parents' permission in so many of our public schools today.

[fol. 82] The relator's son, James Terry McCollum, took the religious education courses for one semester in the fourth grade at the South Side School. There is no proof in the case that his work in his other studies suffered because of this. A large number of young people from the different grade schools who had taken these courses, and quite a number of other young people who had not taken religious education courses all testified in court. Their evidence shows that the religious education courses did not adversely affect their other secular studies.

The petition charges that the children harass and annoy their parents to take religious education; that the ultimate effect of these courses is to establish in the minds of these children a knowledge, interest and belief in a certain God and Bible approved and taught by the instructor. The nature of these beliefs is amplified in the petition. Except that James Terry McCollum did ask and urge his mother to be allowed to take the religious courses there is no evidence of "harassment". There is no doubt that the effect of the courses is to inspire belief in God and interest in the Bible taught.

None of the materials and supplies used in connection with said courses is furnished at public expense. The pupils in said classes in religious education are admitted

only on the written request of their parents or guardians, and then only to classes conducted by faiths designated by such parents or guardians. The defendant school district has been willing to grant its permission for the similar, free and equal use of rooms in the school buildings when not in use for school purposes, to any other faith or group which desires to make use of the school rooms belonging to [fol. 83] the defendant, for instruction in the tenets or belief or unbelief of such other faith or group.

The proof shows that all of the Protestant groups were taught by Miss Chapin and Mrs. Jorgensen; that children of some thirty-one sects, including Catholic, Jewish, and Protestant, as well as many children without any particular religious preference, took these courses. Likewise, the Catholic and Jewish Churches conducted classes under the system, although the Jewish faith had no classes the last year or two. About eighty per cent of the children in the grade schools, and about twenty per cent of the children in the junior high school took the courses last year.

On the trial an officer in the local organization of Jehovah's Witnesses testified. Thereafter he asked Mr. Mellon, the superintendent of schools of the defendant district, if they could have classes in the system. The superintendent testified that Jehovah's Witnesses or any other sect would be allowed to teach provided their teachers had proper educational qualifications, so that bad grammar, for instance, would not be taught to the pupils. A similar situation developed with reference to the Missouri Synod of the Lutheran Chuch. The evidence tends to show that during the course of the trial that group indicated it would affiliate with the Council of Religious Education.

Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public school buildings said faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system.

The court feels from all the facts in the record that [fol. 84] an honest attempt has been made and is being made to permit religious instruction to be given by qualified outside teachers of any sect to people of their own faith in the manner above outlined. The evidence shows that no

sect or religious group has ever been denied the right to use the schools in this manner. The testimony shows that sectarian differences between the sects are not taught or emphasized in the actual teaching as it is conducted in the schools. The testimony of the religious education teachers, the secular teachers who testified, and the many children, mostly from Protestant families, who either took or did not take religious education courses, is to the effect that religious education classes have fostered tolerance rather than intolerance. As will be referred to shortly, the testimony of the relator, and of her son, James Terry McCollum, stands alone and opposed to all the other evidence in the record, that any child has ever been ridiculed, shunned, embarrassed or ostracized because of his non participation in these courses, or because of his religious beliefs.

The curriculum of studies in the Protestant classes is determined by a committee of the Protestant members of the council of religious education after consultation with representatives of all the different faiths included in said council. The Jewish classes of course would deny the divinity of Jesus Christ. The teaching in the Catholic classes of course explains to Catholic pupils the teaching of the Catholic religion, and are not shared by other students who are Protestants or Jews. The teachings in the Protestant classes would undoubtedly, from the evidence, teach some doctrines that would not be accepted by the other two religions.

In the Protestant classes the evidence all indicates [fol. 85] there was no teaching of any doctrines that would be offensive to any of the Protestant groups participating in the council. From what was said in the testimony of representatives of the Quakers, the Christian Science Church, and Jehovah's Witnesses, the beliefs of these churches as expressed by the representatives would seem not to be in any way in conflict with what Miss Chapin and Mrs. Jorgensen testified was taught to all of the Protestant classes. Likewise it is true that the teaching of Protestant, Catholic and Jewish teachers in these courses would all be in conflict with the teachings of Atheists as those beliefs were testified about by the relator and her father, Mr. Cromwell. They would probably be in conflict with that branch of the Unitarian Church represented by Reverend Philip Schug, who testified on the trial that Unitarians, like the Quakers, are allowed each to determine

for himself what his belief in God is, but that one group of Unitarians shared views as to the existence of God, and the attitude toward the Biblical stories, very similar to the views entertained by the relator, Mrs. McCollum, and by her father.

There is no dispute in the evidence that the relator's son, James Terry McCollum, did ask his mother for permission to take the religious education courses. He took his fourth grade work in what is known as the "South Side School." For one semester the mother granted her permission, and the boy, James Terry McCollum, did take the religious education courses. He was transferred at the end of that year on his mother's request to another school, known as the "Dr. Howard School." The evidence shows that he asked his mother's permission which she refused, to take the religious education courses there. The evidence further shows that at the end of his fifth grade work in the [fol. 86] Dr. Howard School, and during the summer of 1945, after the lawsuit in this case was started, the relator sent her son, James Terry McCollum, to what was called a "demonstration school" at the University of Illinois, in which private school and with relator's knowledge, the boy participated in religious exercises at the beginning of school, and which included the recitation of the Lord's Prayer, the reading and explaining of passages in the Bible by the students, including James Terry, and the singing of some hymns. One of the relator's other children attended another private school where similar religious exercises were conducted.

One matter in issue between the parties is whether the relator's son, James Terry McCollum, was ostracized, ridiculed and humiliated because he did not take the religious education courses in the fifth grade. It is undisputed that during the second semester of his fifth grade work at the Dr. Howard School James Terry McCollum was the only pupil in his room who did not take the religious education courses; that he went to a room called the "music room" the first part of the second semester while the religious education courses were going on. On one occasion he was sent out into the hall and worked at a desk there. He testified that children came by and called him an Atheist, and made fun of him. It is undisputed that his mother did go to see the secular teacher to protest about his being sent out into the hall, although there is a dispute

as to whether there was any charge made by the mother that the child's religious beliefs were discussed in that connection. After that the relator's son was sent to another fifth grade class room to study.

[fol. 87] On the question of ostracism and embarrassment of the relator's son, James Terry McCollum, the great weight of the evidence is against her contention. Not a single witness corroborated him that he was ever referred to as an Atheist by the students in school. On the contrary, a number of his classmates, and at least one close friend, testified that they had never heard the word "Atheist" until the time of the lawsuit in this case; that nobody had ever made fun of Terry or said anything about his religious opinions. The testimony of these children, and their demeanor on the witness stand was convincing.

The evidence is undisputed that James Terry McCollum had difficulties with the other students in his school, but there is no evidence, except his own, that his want of religion had anything to do with these difficulties. He himself testified that he got into fights with the other children, and even spit in the faces of some of them. The secular teacher, Mrs. Taylor, testified that she consulted with the relator about Terry's problems. He had been in the South Side School for fourth grade work, and was transferred by his mother to the Dr. Howard School for fifth grade work. The secular teacher Mrs. Taylor, at Dr. Howard School testified that Mrs. McCollum gave a history of failure of Terry to adjust with other children. Many children who did not take the courses in religious education at all testified that they had never had any embarrassment of any kind because thereof. Many of the children who had taken the courses in the different schools all testified that either the taking or the failure to take religious education had made no difference in their friendships.

Without reviewing all the evidence the court believes the [fol. 88] great preponderance of the evidence shows that James Terry McCollum was not subjected to any humiliation, ridicule, ostracism or embarrassment because of his religious opinions, but that his difficulties were due to his own personality problems, entirely disconnected from any question of religion. On the witness stand he was plainly nervous and excitable. His whole demeanor on the witness stand supports the testimony of his teacher, Mrs. Bessie Taylor, that his behavior problems were not connected

with the religious controversy as set forth in the petition.

He had evidently had some difficulties in his Boy Scout work because he testified he was not going ahead with the Scout work. Mrs. Taylor admitted that she had told the relator privately that she would suggest that he be permitted to take religious education courses to see if that would help him to adjust with the other students. No one contends that she pressed this suggestion, except that relator's son, Terry, testified that she said to him and to the whole class that they ought to make the class one hundred per cent for religious education. This was denied, not only by the teacher, but by several of the other pupils in the room who were present at the time. The evidence shows clearly that the "one hundred per cent" referred to a campaign to sell war stamps or bonds in the school.

The finding of fact on this issue, therefore, will be against the relator, except in so far as there is any natural embarrassment to a child in being the only one in his room who did not take the religious education courses and who went out of the room to study by himself because of that fact.

On the issue whether the religious education courses [fol. 89] occasion an expenditure of public funds, or an appropriation of public funds, the evidence shows that no direct appropriation of any kind, or a direct expenditure of money of any kind, is made by the defendant school district for or on behalf of said religious education classes. Certain cards are used for obtaining permission of parents for their children to take said religious instruction courses, and they are made available through the offices of the superintendent of schools and through the hands of principals and teachers to the pupils of the school district. Said cards are prepared at the cost of the council of religious education. The handling and distribution of said cards does not interfere with the duties or suspend the regular secular work of the employees of the defendant.

Certain rooms of the school building used by the religious classes are lighted, heated, and furnished. Janitor service therein is furnished while the religious education classes are conducted. No charge is made by the defendant to any person or organization on account thereof. The testimony of the defendant shows that the janitor service, salaries, and so forth, would all be the same, whether the religious education courses were conducted or not. For the

most part, the expense of light and heat would be about the same whether the courses were conducted or not. The wear and tear on furniture, due to the religious education classes, so far as the evidence in this case shows, would be negligible.

On a few occasions cards which were the property of the defendant school district were used but were paid for in each instance by the council of religious education. So that it may be said that no public funds have been directly [fol. 90] appropriated by the defendant for private use. But to some slight extent the defendant has indirectly appropriated public funds for the use of these classes, by the furnishing of rooms in public school buildings, light, heat, janitor service, and so forth, as above indicated.

It is believed that the foregoing will dispose of the controverted issues of fact. We come then to the important legal question in the case. Broadly stated, that question is: Did the defendant, Board of Education of School District Number 71, have the power under the law to permit school buildings of the district to be used for teaching religious education in the manner and under the circumstances detailed above, as against the written protest and demand of the relator, a tax payer and parent in said school district?

Somewhat more narrowly stated the question is whether the teaching of religious education in the Champaign public schools in the manner shown by the evidence in this case is repugnant to the Federal and State Constitutions, and in violation of the statutes of Illinois.

The Law

One contention of the defendant board of education is that the private relator has no standing in court to bring this suit; that affecting the public rights, it can only be brought by the State's Attorney or the Attorney General. This contention raised on preliminary motion was overruled. The court still adheres to that ruling (38 C. J. 839, 890, and Illinois cases cited; *People* v. *Harris*, 203 Ill. 272).

Another contention earnestly urged by defendant school [fol. 91] board is that the relator who avowedly has no religious beliefs of her own at all is not prosecuting this suit for mandamus in good faith to protect her constitutional rights, because her conduct shows that she has permitted her child, James Terry McCollum, to attend the

courses in religious education in the schools, and even during the pendency of this suit has permitted him to attend a private school where the Lord's Prayer was recited, and readings from the Bible were given; that like the student at the University of Illinois in *North* v. *Board of Trustees*, 137 Ill. 296, at 305, no real damage has been or is being done to Mrs. McCollum in the teaching of religious education in the schools in the manner shown by the record in this case. We do not find it necessary to pass upon this contention, but prefer to rest our decision upon the question of the constitutionality and legality of the acts of the school board in permitting religious education to be taught in the schools in the manner shown by the testimony in this record.

We come then to the discussion of what relator calls her theory of the case. Her contention is that school laws become laws for *establishment of religion* where religious education in the public schools and the public school houses aids, creates and increases interest in the religion and patronage of churches whose religion is being taught. Relator contends the Champaign system of religious education violates the First and Fourteenth Amendments to the Constitution of the United States.

Amendment (I) provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" and we agree with relator's counsel, that the Fourteenth Amendment to the Federal Constitution, Section 1, which provides: "No State shall make or [fol. 92] enforce any law which shall abridge the privileges or immunities of citizens of the United States," extends the operation of the First Amendment to the Federal Constitution to the State of Illinois and its school subdivisions, including defendant. (*West Virginia* v. *Barnette*, 319 U. S. 624, 63 Sup. Ct. 1178, 1185.)

The provisions of the Illinois Constitution relied on are contained in Article II, Section 3, which are as follows:

"The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; * * * No person shall be required to attend or support any ministry or place of worship against

his consent, nor shall any preference be given by law to any religious denomination or mode of worship."

and Article VIII, Section 3, of the Illinois Constitution which provides:

"Neither the general assembly nor any * * * school district * * * shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose."

A careful reading of the Federal and State Constitutional provisions leads us to believe that one covers the same ground as the other; that if anything our own State Constitution is more specifically stringent than the Federal. Two thoughts are expressed in the constitutional provisions: First, that no political entity, including both legislatures and school boards, has power to set up a state church, requiring the citizens to pay taxes for one form of religion as distinct from any other religion or lack of religion; secondly, that no political entity has power to make any law or ordi- [fol. 93] nance, or regulation prohibiting the freedom of the exercise of religion by the people.

What do the Federal constitutional provisions mean: That "Congress shall make no law respecting an establishment of religion", and the kindred provision that: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed"? At the time the colonists came to this continent before the Revolution, and at the time the Federal Constitution was written, the church of the mother country, England, was known as the "established church." It was a church for whose support everybody in England was required to pay taxes, although many of the citizens of England did not believe in the doctrines of that church. Even among the colonists some particular sects had the taxing support of the various States before and after the writing of the Federal Constitution.

It seems plain that the primary object sought to be obtained in the constitutional provisions was that there should be no state church. In this sense there is no question but that the constitutional provisions sought a separation of the powers of church and state, but relator's counsel in their brief give this phrase "the separation of church and

state," a far broader meaning. They say that religion cannot be brought into the public schools without abridging the rights of every person in this country to his inalienable rights to worship as he so desires; that the realm of religion is entirely beyond the scope of the state, that the bulwark of religious training is found in the home and in a fully supported church program of child education. In their reply brief relator's counsel say: "The whole scheme provides a business of religious promotion for which money [fol. 94] may be collected and salaries paid. * * * It seems to be a mercenary business venture which must eventually clash with the law."

For the construction of the word "establishment" in the Federal Constitution we are referred by relator to *Davis v. Beason*, 133 U. S. 333, 342; 10 Sup. Ct. 299, 300. In that case the court was dealing with the validity of a law of the territory of Idaho which provided that bigamists, polygamists, and believers in plural or celestial marriages were denied the right of franchise. The Supreme Court held that this statute was constitutional.

In reply to the contention that the Mormon religion was protected by the Federal Constitution the court said:

"The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question. It was never intended or supposed that the [fol. 95] amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."

No case has yet reached the United States Supreme Court dealing with the question in this case. The nearest to a discussion of the question in the Federal courts that we have been able to find is in the dissenting opinion of Mr. Justice Frankfurter in *West Virginia* v. *Barnette*, 319 U. S. 624, 63 Sup. Ct. 1178, at 1195, where it is said:

"Consider the controversial issue of compulsory Bible-reading in public schools. The educational policies of the states are in great conflict over this, and the state courts are divided in their decisions on the issue whether the requirement of Bible-reading offends constitutional provisions dealing with religious freedom. The requirement of Bible-reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great English literature. Is this Court to overthrow such variant state educational policies by denying states the right to entertain such convictions in regard to their school systems because of a belief that the King James version is in fact a sectarian text to which parents of the Catholic and Jewish faiths and some Protestant persuasions may rightly object to having their children exposed? On the other hand the religious consciences of some parents may rebel at the absence of any bible-reading in the schools. See *State of Washington ex rel. Clithero* v. *Showalter*, 284 U. S. 573, 52 Sup. Ct. 45, 76 L. Ed. 498. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state [fol. 96] may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. Compare *Scopes* v. *State*, 154 Tenn. 105, 289, S. W. 363, 53 A. L. R. 821."

We have, however, in the Supreme Court of the United States direct and unmistakable authority for the proposition that the doctrine of separation of church and state does not mean that there is any conflict between *religion* and *state* in this country, or any disfavor of any kind upon religion as such. In *Pierce* v. *Society of the Sisters of the Holy Names*, 268 U. S. 510; 45 Sup. Ct. 571, at 573, where

the court held invalid a statute of Oregon requiring the children of all citizens to attend public schools, the court said:

"The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Again, in *Rector, etc. Holy Trinity Church* v. *U. S.*, 143 U. S. 457, 12 Sup. Ct. 511, the court was construing a Federal statute prohibiting the importation of any alien into the United States under contract or agreement made previous to the importation of such alien to perform labor or services of any kind in the United States. Holy Trinity Church had hired an English rector to preach in their church. Although he came squarely within the language of the act the Supreme Court, examining the history of the legislation and the attitude toward religion of all public bodies in our country, found that his importation was not illegal. In the unanimous opinion of the court some of the language of Mr. Justice Brewer is as follows:

"But, beyond all these matters, no purpose of action [fol. 97] against religion can be imputed to any legislation, state or national, because this is a religious people."

The decision traces the reliance upon God, from the commission of Christopher Columbus, through the charters to the Colonies; refers to the language of the Declaration of Independence; specifically calls attention to the Constitution of Illinois of 1870: "We, the people of the State of Illinois, grateful to Almighty God for the civil, political, and religious liberty," etc.; the requirements of oaths in our courts and the repeated reference to the Deity, in the Constitution and laws of the United States, and the States.

Mr. Justice Brewer again, at page 516, says:

"There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning. They affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of

private persons. They are organic utterances. They speak the voice of the entire people."

For a very full and complete history of the influence of Christianity and religion upon our national life we call attention to *Wilkerson* v. *Rome*, 152 Ga. 762, 110 S. E. 895, 20 A. L. R. 1334, which case (p. 1346, 20 A. L. R.) refers to the analysis and criticism of the *Ring* case (hereinafter referred to) by Professor Schofield of Northwestern University in his work on constitutional law. (Constitutional Law, p. 459 to 509.)

The case relied upon by relator under the Federal constitutional provision is *West Virginia* v. *Barnette*, 319 U. S. 624, 63 Sup. Ct. 1178, where the court overruling a prior ruling in the Gobitis case, held unconstitutional the requirement of the board of education of West Virginia that all pupils attending a public school shall be required to [fol. 98] salute the Flag of our country. Children of members of Jehovah's Witnesses refused to salute the Flag, and were expelled from the schools. These children were threatened with reformatory confinement as criminally inclined juveniles. The parents were prosecuted for failure to send their children to school after expulsion. Members of Jehovah's Witnesses, including the children, refused to salute the Flag because to them the Flag was an idol of worship, and the worship of any idol, under their religious beliefs, was a violation of the Law of God.

The essential part of the First Amendment to the Federal Constitution involved was that neither Congress nor the State could pass any law prohibiting the free exercise of religion. The case was not concerned at all with the question of whether the State or Nation was establishing religion. The following language (63 Sup. Ct. 1181) in the majority opinion is important in the consideration of the case at bar:

"The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between author-

ity and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child."

It may therefore be said that so far as Federal constitutional provisions are concerned, and conceding that they [fol. 99] are binding upon the State of Illinois, and on the defendant school board, there is nothing in any expression of the Federal Supreme Court that remotely indicates there is any constitutional objection to the Champaign system of religious education.

We come now to a consideration of the Constitution of Illinois and of the cases in our own Supreme Court dealing with those provisions. The relator rests her entire case for all practical purposes on the case of *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334. Before taking up that case it will be well to take up the whole series of cases in the Supreme Court of Illinois, including the Ring case, to determine the legality of the defendant board's acts in the case at bar. May we again state that the Illinois Constitution insures "The free exercise and enjoyment of religious profession and worship, without discrimination"; and it provides, "No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship"? Further, it provides that no school board "shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose."

One of the earliest cases under these provisions of the Constitution arose in 1879, being *Nichols* v. *School Directors*, 93 Ill. 61. Mr. Justice Sheldon who wrote the opinion was a member of the constitutional convention in 1870. It was a suit for injunction by a citizen and a tax payer within a school district to restrain the school directors from allowing the school house of the district to be used for the purpose of a religious meeting house.

The plaintiff in that case, like the relator in the case [fol. 100] at bar, stated that he was opposed to the use of a school house for these purposes, that they were contrary to the law of the land. Certainly it would seem that the use of a school house to hold religious meetings by the directors

would come perilously close to the prohibition of Article VIII, Section 3, which forbids any school district from ever making any appropriation or paying from any public fund whatever anything in aid of any church or sectarian purpose. However, the demurrer to the bill was sustained in the trial court. This was affirmed in the Supreme Court. Some of the language in that case answers the contention of the relator in this case, that the furnishing of lights and janitor service, the wear and tear on furniture, and so forth, is an illegal appropriation of school property for religious purposes. The court said:

"In what manner, from the holding of religious meetings in the school house, complainant is going to be compelled to aid in furnishing a house of worship and for holding religious meetings, as he complains in his bill, he does not show. We can only imagine that possibly, at some future time, he might as a tax-payer be made to contribute to the expense of repairs rendered necessary from wear and use of the building in the holding of religious meetings. A single holding of a religious meeting in the school house might, in that way, cause damage in some degree to the building, upon the idea that continual dropping wears away stone, but the injury would be inappreciable. As respects any individual pecuniary expense which might be in this way involved, we think that consideration may be properly disposed of under the maxim *de minimis*, etc.

"The thing contemplated by the constitutional provision first above named was a prohibition upon the legislature to pass any law by which a person should be compelled [fol. 101] without his consent to contribute to the support of any ministry or place of worship.

"Such a matter as the subject of complaint here, we do not regard as within its purview.

"Religion and religious worship are not so placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the State. That instrument itself contains a provision authorizing the legislature to exempt property used for religious purposes from taxation; and thereby, the same as is complained of here, there might be indirectly imposed upon the tax-payer the burden of increased taxation, and in that manner the indirect supporting of places of worship. In the respect of

the possibility of enhanced taxation therefrom, this provision of the constitution itself is even more obnoxious to objection than this permission given by the school directors to hold religious meetings in the school house. There is no pretence that it is in any way in interference with the occupation of the building for school purposes."

In *Millard* v. *Board of Education*, 121 Ill. 297, it was held that where a school board rented the basement of a Catholic church for school purposes and taught school there from nine o'clock in the morning, on, that no tax payer could complain that just before school started; and after school ended, pupils who voluntarily desired to do so, participated in Mass, the saying of the Angelus, and other Roman Catholic services. The bill for injunction was dismissed. The lack of compulsion in participation in religious services was manifest. The court said (p. 302):

"Nor is it claimed that complainant's children are required, against his will or desire, to attend, any religious or sectarian instruction in the school. Under such circumstances, we see no ground for relief, under this part of the bill."

[fol. 102] In the case of *North* v. *Trustees*, 137 Ill. 296, mandamus was sought by a student at the University of Illinois. The rules of the University required a student to attend chapel where the Lord's Prayer was recited, and the Scriptures were read. The rules of the University also provided that the student could be excused by stating that such exercises offended his conscientious scruples, but the student refused to sign such an excuse, resting his case on the alleged illegality of these chapel exercises. He was expelled from school in 1885. Five years later he brought suit in mandamus to compel the University to re-admit him. He did not state why he wanted to be re-admitted. Mandamus was denied. After speaking briefly of the religious exercises in chapel the court said:

"Parents placing their children in colleges and universities often desire that they shall be brought under such influences. Shall a court say such a requirement is, in and of itself, a violation of said constitutional provision, merely because some one or more students attending the university may object to obeying it? More specially, should this be done when, as is here shown by the answer, the rules ex-

pressly provide that for good cause students may be excused from obedience to such regulation? We have said in construing this section of the constitution: 'Religion and religious worship are not so far placed under the ban of the constitution that they may not be allowed to become the recipients of any incidental benefit whatever from the public bodies or authorities of the State.' (*Nichols* v. *School Directors*, 93 Ill. 64.)"

In order of time we now come to *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334. It is generally conceded that this case has gone further than any other case in the United States to ban the Bible from the public schools. [fol. 103] Therefore, the facts and the exact question decided in that case become important. The case arose on demurrer to a petition for mandamus, where the allegations of the petition were taken as true, and where no evidence was heard in the trial court.

The petition averred that the relators, as Vashti McCollum here, were residents and tax payers of the school district. The relators in that case, however, were members of the Roman Catholic Church. Quite a number of Catholic families were involved in the suit. The petition averred that the teachers employed by the schools read to the pupils, including the children of the Catholic relators, during school hours, portions of the King James version of the Bible; that sacred hymns were sung in concert by the pupils; that the Lord's Prayer was recited in concert by the students in those school rooms; that the children of the relators were required to rise in their seats, fold their hands and bow their heads while the Bible was read and the Lord's Prayer was recited; that under the teachings of the Catholic Church the Lord's Prayer recited in school was different from that taught as the Lord's Prayer in the Catholic Church; that the King James Version of the Bible was unacceptable to the Catholic relators and their children. It was averred that by reason of these things the relators' constitutional rights under the State and National Constitutions were violated, and prayed mandamus to stop the religious exercises.

The trial court sustained the demurrer to the petition. On writ of error the ruling of the trial court was reversed by a divided Supreme Court. Mr. Justice Dunn wrote the majority opinion. There was a vigorous dissent by Justices

[fol. 104] Hand and Cartwright. In the majority opinion it was held that the exercises, including the reading of the Bible, the singing of the hymns, and the recital of the Lord's Prayer constituted acts of worship, that they violated that part of Article II, Section 3, of the Constitution of Illinois providing: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed. . . . No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."

After deciding this the court went further, and said that these exercises not only constituted a violation of the guarantee of freedom of worship but the exercises also violated the provision of the Constitution which prohibits the payment from any public fund of anything in aid of any sectarian purposes. At page 340 the court said:

"The public schools are supported by taxation, and if sectarian instruction should be permitted in them, the money used in their support would be used in aid of a sectarian purpose. The prohibition of such use of public funds is therefore a prohibition of the giving of sectarian instruction in the public schools."

The court then held that the reading of the Bible in the schools was sectarian instruction because the Catholics and Protestants use different versions of the Bible, because different sects of the Protestant churches, and of the Catholics and Jews place different interpretations upon the same Scripture. Finally (p. 351), in discussing whether such instruction violated the constitutional prohibition of payment from public funds in aid of sectarian purposes the majority opinion, in discussing the Kentucky and Kansas [fol. 105] decisions which upheld such instruction, used the following language which relator particularly relies upon in the case at bar:

"The Kentucky and Kansas decisions seem to consider the fact that the children of the complainants were not compelled to join in the exercises as affecting the question in some way. That suggestion seems to us to concede the position of the plaintiffs in error. The exclusion of a pupil

from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain of the pupils must be excused from it because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the constitution."

The above language was not necessary to the decision of that case. The Catholic children under the allegations of the petition which were admitted by the demurrer were required to attend the school and to stand with bowed heads while the Lord's Prayer was recited and the King James version of the Scriptures was read. Moreover, it may be said in the case at bar that the conclusion reached by the majority opinion that the exclusion of a pupil from religious exercises in which the rest of the school attends, subjects him to religious stigma, and so forth, is a matter that is covered by the actual testimony in the case at bar. As we have found above, and as a reading of the record in this case convinces us, James Terry McCollum was not subject to religious stigma and placed at a disadvantage in the school because of his non religious beliefs.

[fol. 106] Justice Cartwright, who joined in the dissenting opinion, is recognized as one of the ablest judges who ever sat in the Supreme Court of Illinois. He with Justice Hand called attention to the fact in the dissenting opinion that the great weight of authority everywhere was contrary to this case, that the decision itself in spirit was entirely opposed to the other cases in the Supreme Court of Illinois which we have referred to above, before that time.

Before discussing the *Ring* case further we take up the cases that have arisen in the Supreme Court since the *Ring* case, dealing with the same constitutional provisions. Just three years later, in the case of *Reichwald* v. *Catholic Bishop*, 258 Ill. 44, a tax payer in Cook County filed a bill in equity to restrain the board of commissioners of Cook County from permitting the Catholic Bishop and archbishop to erect a Catholic chapel to be used for religious

worship and funeral services on the Cook County poor farm which was owned by the county.

The bill showed that the Catholic Bishop had offered to erect this chapel and to maintain it at his own expense, to provide Catholic services and Catholic burial for those of the poor who used the poor farm, and the title to the buildings was to be in Cook County. It is interesting to note that Mr. Justice Dunn, who wrote the majority opinion, in the *Ring* case, wrote the opinion in this case. It was held that the county had full power to permit the use of the building for religious worship and funeral services on property of the county, as long as Cook County was not obligated financially to pay toward such religious worship or services.

At page 48 of the opinion is the following language which [fol. 107] we feel is applicable to the Champaign plan of religious education:

"No one can be obliged to attend or to contribute, but no one has a right to insist that the services shall not be held. The man of no religion has a right to act in accordance with his lack of religion, but no right to insist that others shall have no religion."

Then the case of *Nichols* v. *School Directors*, 93 Ill. 61, is again quoted with approval, as justifying the decision in the *Reichwald* case.

In *Dunn* v. *The Chicago Industrial School*, 280 Ill. 613, a tax payer in Cook County filed a bill to enjoin the payment of county funds to the Chicago Industrial School for Girls, for the care of delinquent girls sent there by the juvenile court of Cook County. This school was maintained by the Roman Catholic Church. At this school religious training was given, and religious services were held, for those girls who were there committed. If a narrow view were taken of the constitutional prohibition it would seem that these acts were certainly in violation of Article VIII, Section 3, of the Illinois Constitution, prohibiting the appropriation of money in aid of a sectarian purpose, but Justice Cartwright in delivering the unanimous decision of the court held that where the expense of maintaining the wards of the state who espoused the Catholic belief, in this Industrial School, was less than the cost of maintaining juvenile delinquents at the state institutions, there

was no appropriation of money in aid of sectarian purposes. In construing the provisions of the Illinois Constitution involved in this case he said, at page 616:

"The people not only did not declare hostility to religion but regarded its teachings and practices as a public benefit which might be equal to the payment of taxes, and by [fol. 108] section 3 of article 9 of the constitution provided that property used exclusively for religious purposes may be exempted from the burden of taxation, and the General Assembly, by virtue of that provision, has declared such exemption. In harmony with the provision for the free exercise and enjoyment of religious freedom and worship, the General Assembly in the Juvenile Court act provided by section 17, that 'the court in committing children shall place them as far as practicable in the care and custody of some individual holding the same religious belief as the parents of said child, or with some association which is controlled by persons of like religious faith of the parents of said child.'

"Not only have the people, by the constitution and by their representatives in the General Assembly, recognized and provided for the enjoyment of religious liberty, but the court has not adopted any rule antagonistic thereto. In *Nichols* v. *School Directors,* 93 Ill. 61, the Court said: 'Religion and religious worship are not so placed under the ban of the constitution that they may not be allowed to become the recipients of any incidental benefit whatsoever from the public bodies or authorities of the State.' "

In the later case of *St. Hedwig's Industrial School for Girls* v. *Cook County,* 289 Ill. 432, a very similar case, St. Hedwig's and the Polish Manual Training School for Boys, which were run and maintained by religious organizations, sued Cook County for unpaid tuition and care of dependent children committed to these schools by the juvenile court of Chicago. The court unanimously held that these payments were not in violation of Section 3, Article VIII of the Constitution, citing the *Dunn* case in 280 Illinois, as well as other cases.

We now come back to the *Ring* case. Were the *Ring* case presented to us as a matter of first impression we would [fol. 109] have arrived at the same conclusion as did our Supreme Court, for under the compulsion exerted by the

public school teachers in that case on the Catholic pupils, we would agree that their constitutional rights were violated. However, as authority for a decision on the facts in the case at bar, it is peculiar that the *Ring* case is not mentioned in any of the later decisions by the Supreme Court of Illinois construing religious freedom clauses of our Constitution. Then too, the language in the later opinions would tend to narrow and circumscribe what was said in the *Ring* case. The authority of the *Ring* case is weakened by the fact that it goes farther than any other case in the United States in its language. The actual holding of the case is opposed to the great weight of authority in the United States. We shall not attempt to discuss the facts or holdings in cases from other jurisdictions because we are bound by the decisions of our own Supreme Court, but the decisions in the United States generally, and the trend of authority since the time of the *Ring* case may be found under the following annotations: 5 A. L. R. 866, 20 A. L. R. 1351, 31 A. L. R. 1125, 57 A. L. R. 195, 141 A. L. R. 1145.

The relator particularly relies upon *State* v. *Weedman*, 55 S. Dak. 343, 226 N. W. 348, 349, 354, and *State* v. *Frazier*, 102 Wash. 309, 173 Pac. 35. In the *Weedman* case the facts were almost exactly like those in the *Ring* case. Fifteen Catholic children were expelled because they would not attend opening exercises required by the school, where the Lord's Prayer was said, and the Bible read. Mandamus to compel the children to be readmitted to the school was allowed.

In *State* v. *Frazier* there was a state law purporting [fol. 110] to provide that the school should furnish written outlines on the Bible and give examination and school credits in Bible reading. This was held to be violative of the constitutional provision that no public money or property should be appropriated for or applied to any religious exercises or instruction. We pause to point out there was an element of actual compulsion on the school children to participate in religious exercises abhorrent to children and their parents in the *Ring* case and in every other case where religious instruction in the schools has been condemned. That compulsion does not exist in the case at bar.

Counsel for relator rely upon the dictum in the *Ring* case, that compulsion is exercised because James Terry

is not excused from school but is required to do his other school work, while his schoolmates were taking the courses in religious education. The fact remains, however, that James Terry McCollum was not required to take the religious education courses and he was sent away from the room where the exercises were going on, so there could be no claim that any actual compulsion was used against him.

We have in the case at bar evidence as to what the effect of these religious education courses has been in the school system itself. James Terry's case was the extreme case in the second semester of the fifth grade, when he was the only one in his room who did not take the religious education courses. The overall picture is that 20 out of 100 in the grade schools did not take the courses and 80 per cent in the junior high school have not taken the courses.

There was a full and representative group of students from the grade schools and from junior high school, whose testimony could not help but impress favorably the trial [fol. 111] judges, as to the beneficial results of religious education, and the freedom from intolerance and the other evils that are mentioned in the *Ring* case, and in those courts who frown upon Bible reading, and so forth, in the schools.

There is another reason why it seems to us that the case at bar is entirely distinguishable from the *Ring* case. As pointed out in the annotations in 5 A. L. R. 866, and the other volumes, the question of what is legal or illegal in the schools as constituting sectarianism divides itself into a number of different categories, which are listed as follows:

(1) Mere reading of the Bible;

(2) Reading Bible and saying Lord's Prayer;

(3) Teaching Ten Commandments;

(4) Reading Bible and singing hymns;

(5) Saying prayers;

(6) Use of Bible as textbook;

(7) Use of textbook founded on Bible.

In the *Ring* case there was a combination of prayer, Bible reading, and the singing of hymns. In the cases from other states which we have examined there is almost always a similar combination, plus the fact that an earnest sincere minority of religious people, usually Catholics or

Jews were compelled to join in religious services that were abhor-ent to them. In the case at bar no prayers were offered in any of the religious classes, and no hymns were sung. The Bible was used as a text book and outlines and other reading material founded on the Bible were taught.

We state again for emphasis that so far as the Bible was read or taught in the schools, there seems to have been a sincere effort to present by Protestant teachers to pupils of some thirty-one different Protestant sects, [fol. 112] the broad, moral truths of the Bible, excluding from the teaching as far as possible, controversial matter that divides the sects. Practically nothing was asked of Father Higgins or of Rabbi Golden as to the content of the teaching of the Catholic and Jewish students, but at least there is nothing to indicate that the teaching of the Catholic and Jewish students inculcated any antagonism toward Protestants or others.

In this situation the language from two of the cases relied upon by the relator it seems to us is particularly in point as sustaining the legality of what is referred to as the Champaign system of religious education. In the case of *Village of South Holland* v. *Stein*, 373 Ill. 472; and *City of Blue Island* v. *Kozul*, 379 Ill. 511, where discriminatory treatment of Jehovah's Witnesses was condemned as unconstitutional, and where the able counsel representing the relator in this case appeared in those cases, the court said, quoting from *City of Blue Island* v. *Kozul*, 379 Ill. 511, at 521:

"The fact that when so applied the ordinance is unconstitutional does not determine that it would be invalid for that reason when applied to other and different facts."

So in the case at bar we feel that the illegal conduct condemned in the *Ring* case does not determine that the conduct of the classes as shown by the record in this case violates the constitutional provisions, State or Federal under the other and different facts in the case at bar.

From the earliest times it has been held that school boards and school directors are vested with wide discretion in their conduct of the schools, subject, however, to constitutional and statutory limitations on their powers. [fol. 113] (*Board of School Inspectors* v. *Grove*, 20 Ill. 526; *The Trustees of Schools* v. *People ex rel. Van Allen*, 87 Ill.

303; *People ex rel.* v. *City of Chicago*, 278 Ill. 318; *Segar* v. *Board of Education*, 317 Ill. 418.)

The recent case of *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, 156 N. E. 663, affirming 215 N. Y. Supp. 632, and 219 App. Div. 233, 219 N. Y. Supp. 189, holds that the school authorities under very similar constitutional provisions as ours, may release students during school time to attend religious education classes in their own churches. This of course does not meet the relator's objection to the use of the school buildings themselves, but no case has been cited to us where the purely voluntary participation in religious education classes, no part of the expense of which is borne by the tax payers, has been condemned.

Again applying the language of the Supreme Court of the United States in *West Virginia* v. *Barnette*, 319 U. S. 624, 63 Sup. Ct. 1178, at 1181, the freedom asserted by the relator and by James Terry McCollum, to have religious education in these voluntary classes excluded from the schools of Champaign does bring the relator and her son into collision with the rights asserted by the intervenors who are representative of eighty per cent of the children attending the grade schools, and a substantial per cent of those attending junior high school.

Only one witness with children in the local schools, besides the relator, namely, Mr. Adams, expressed any dissatisfaction with this program. We freely concede that if James Terry McCollum stood alone and were compelled to participate in religious exercises to which he had conscientious [fol. 114] objection it would make no difference if there were a million people on the other side, but in our view of the matter there has been no such compulsion visited upon him.

The evidence on the trial indicated there are approximately 1,850 school systems in 46 states of this country that have some form of religious education in the school system. We have not been favored with the details—and they are perhaps not important—in other states. We suppose that this includes systems where the children, as in New York, are released from the school buildings to go to their church buildings for religious instruction, and therefore do not present the same problem that we have in the case at bar.

Believing as we do that no constitutional or statutory rights of the relator and her son, James Terry McCollum, have been violated by the Champaign system of religious

education as it is conducted, according to the testimony in this record, the petition for mandamus will be denied.

The docket orders in this case, therefore, will be:

Evidence and arguments having been heard, briefs having been considered, findings of fact and of law as set forth in written opinion on file; and finding that petition of relator for mandamus should be denied; judgment in favor of defendant in bar of the action and petition of the relator, and writ of mandamus denied and judgment for costs against the relator.

Martin E. Morthland, Grover W. Watson, Frank B. Leonard, Trial Judges.

ORDER DENYING PETITION FOR MANDAMUS—January 26, 1946

Order entered January 26, 1946, denying petition for [fol. 115] mandamus and judgment entered in favor of the defendant, relator to pay all costs.

Affidavit of mailing notice of appeal and praecipe for record, filed March 22, 1946.

[Title omitted]

NOTICE OF APPEAL—Filed March 22, 1946

To: Board of Education of School District Number 71, Champaign County, Illinois, Defendants-Appellees; and Elmer C. Bash and Alice J. Bash, and Wanda I. Bash, a minor, by Elmer C. Bash, her father and next friend, Intervenors:

Please take notice that plaintiff in the above-entitled [fol. 116] cause hereby appeals to the Supreme Court of Illinois from the order entered in this case by the Circuit Court of Champaign County on the 26th day of January, 1946, denying the petition for mandamus in this cause.

Plaintiff prays that the Supreme Court of Illinois will reverse the order entered upon January 26, 1946, and either grant a writ of mandamus in accordance with the prayer of

the plaintiff in the petition filed in this cause or, in the alternative, that the Supreme Court remand this cause to the Circuit Court of Champaign County, Illinois, with directions to enter its writ of mandamus as so prayed, or for such other relief as may be warranted.

The People of the State of Illinois, ex rel Vashti McCollum, By Walter F. Dodd, Attorney for Plaintiff.

Walter F. Dodd, Attorney at Law, 30 N. La Salle St., Chicago, Illinois.

Praecipe for complete record filed March 22, 1946.

Proceedings had on the hearing on motion of defendant to quash petition, with argument of counsel and statement by the court of its reasons for overruling said motion. (Not abstracted.)

REPORT OF PROCEEDINGS

Report of proceedings at the trial hereof before Honorable Frank B. Leonard, Martin E. Morthland and Grover W. Watson, Judges of the Circuit Court of the Sixth Judicial District, sitting *en banc*, commencing September 10, 1945.

[fol. 117] Present: Mr. Landon L. Chapman, on behalf of Plaintiff; Messrs. Meyer & Franklin, Mr. John L. Franklin, of counsel, on behalf of defendant; Messrs. Eckert & Peterson, Mr. Abe R. Peterson and Mr. Owen Rall, of counsel, on behalf of intervenors.

Opening statement on behalf of relator.
Opening statement on behalf of defendant.
Opening statement on behalf of intervenors.

MAE CHAPIN, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Miss Mae Chapin, 616 West Church, Champaign, Illinois. I am a teacher in religious education in the public schools in the city of Champaign. I am not employed

by the schools. I have been teaching religion in the schools of the city of Champaign for three years. Before that I was a missionary teacher in Hanoi China, Manila and the Philippines. I was in China from 1913 to 1925, and from 1927 to 1935. Then I was a member of the Philippine Mission until I resigned March 31, 1943. Then I was employed by the American Presbyterian Foreign Missionary Board, whose headquarters are in New York. In the Philippines I was employed by the same parties.

At present I direct the work of the religious education classes in the public schools in Champaign. I also teach. There are about 35 religious education classes in the public schools in the city of Champaign. They are from grade 4 through grade 9, three years in elementary and three years [fol. 118] in junior high. Last year I taught 19 of them. Mrs. Jorgensen taught 12. There were also representatives of the Catholic group. Father Higgins taught one of the Catholic classes. I believe the other was Father O'Connor. They taught different classes, different schools. I know they taught at Columbia School, the South Side school and the junior high school. I arranged for the Catholic teachers, the time for them to teach, but the instruction is left to the Catholic group. I made arrangements for them with the various principals of the public schools. This was done by conversation with the principal usually at the school. I did not go during the time of day that they were teaching; I went before school. To my recollection I never interviewed them during school hours.

The principal of the Columbia School was Miss Aye. I do not recall exactly when I made the arrangement with her. I did not have much conversation with her at the time I made the arrangement because she was used to the program. I cannot recollect the conversation with her. I do not recall any conversation with any principal about arrangements to teach religion in the public schools. All I know is that I took the course to them and asked the time that would best suit them, because they have their other classes and this religious education takes part in their program after the others are arranged. In arranging for this time I did not take into consideration the convenience of the religious teachers.

I had six classes at the Dr. Howard school. Monday morning at 9 o'clock I taught one of the sixth grade classes. Last semester when I would appear at 9 o'clock in the morn-

ing I would find about 5 or 6 students in the class room out of about 28 in the class. No children left the class room after [fol. 119] I came. None came in after I came until I was going at 9:30. Then I went to another sixth grade class room. The first semester 5 or 6 were out of that room, leaving about 26. I think those who left went to the office with their teacher. That is the procedure that I followed throughout the day at the Dr. Howard school.

When I entered the class room for the teaching of religious education the secular teacher in some rooms took the pupils to the library. Some of the teachers stayed in the room while I was teaching. They did not participate in the religious education with me.

I am employed by the Champaign Council of Religious Education, composed of the different denominations and different faiths. Included therein are the Presbyterian, the Baptists, Methodists, United Brethren, Christian, Episcopalian and Congregationalists. I do not remember all of them.

I was first spoken to about employment by the director, then I met the personnel of the committee. The director at that time was Mrs. L. E. Workman. She employed me. My contract was renewed each year, including 1945-1946. I consulted with the personnel committee with reference to renewing my contract. That committee refers it to the council to vote on it. The personnel committee this year is composed of Rev. A. Ray Cartlidge and Mr. E. O. Bottenfield. I think the conversation with reference to renewing my contract for 1945 and 1946 took place at a religious education council meeting at the Baptist church. This council is composed of ministers and laymen interested in religious education among the children of the schools. They are not members of the school board. I am not aware if they are public officials.

Q. Did you understand you were being employed by both public officials and private individuals?

A. Private, by this organization.

[fol. 120] Q. Private Persons?

A. Yes, sir.

Mr. Franklin: I object to that as calling for a legal conclusion.

The Court: The objection is sustained.

The Witness: (Continuing.) I do not know if this religious council is a corporation. They had a verbal contract

with me. I am paid by the treasurer of the council by check written on the Council of Religious Education. I am not employed by the school board.

Q. How much salary do they pay you?

Mr. Franklin: Objected to as immaterial.

The Court: I will let her answer.

The Witness: (Continuing.) I received $90 a month and I consider it a service. I receive no other compensation.

The Protestant religious education teachers are under my supervision. I counsel with the curriculum committee as to what we shall teach, then I talk over with the other teachers what material we shall use. The curriculum committee is composed of Mrs. Peter Auten and Mrs. L. E. Workman. Mrs. Workman is at present a teacher in the Urbana high school. My employment has nothing to do with her service there in the high school. Mrs. Auten is a housewife, not engaged in public work of any kind. She is affiliated with the Presbyterian church. Mrs. Workman is affiliated with the Congregational. They consult with me with reference to the curriculum and the material which I teach. They approve of it. They do not specially submit it to anyone else for approval.

James Terry McCollum, the son of the relator, did not attend any of the classes that I taught. He was not a member of any class in the Dr. Howard School to whom I taught religious education. Last year I taught two fifth grade classes in the Dr. Howard School. He did not attend either [fol. 121] of them. I do not know if he attended them during secular teaching. I know him by sight. I had seen him around the school. There was nothing that attracted my attention to him. Nobody pointed him out to me especially. I learned his name one morning when I was in the class room before school. A little boy brought in some flowers to the secular teacher, Mrs. Taylor, and I learned that his name was Terry. I do not remember if he ever left the class room when I came to teach religious education.

I did not have 100 per cent in Mrs. Taylor's class. The first semester several of them did not attend. The second semester most of them did. I do not have my figures here. In all my 19 classes there must have been about 2 where there was 100 per cent attendance. In those two classes the children were affiliated with practically all denominations. There were no Catholic children nor Jewish chil-

dren in those classes. There were Christian Scientists. No Seventh Day Adventists. I do not know if there were any affiliated with Moody Bible Institute. I did not have the denominations. I had some 4-Square Gospel boys and girls. I do not remember having any Jehovah's Witnesses.

That was not indicated on the card that they brought to me. The cards their parents signed simply said interdenominational, Protestant, Catholic or Jews, and on the first day when they registered the registration cards told us what denomination they belonged to. When I was teaching in these various classes a great many of them did not belong to the same church that I did, in fact, there were not so many Presbyterians. The school teachers distributed the cards for the parents to sign. I delivered the cards to the school teachers. In some cases the school teachers returned the signed cards to me, and in some cases [fol. 122] we obtained them directly from the pupils. None of the school teachers made any inquiry as to what parents had signed slips. The school teachers did not inquire nor give me any aid or assistance in the matter of obtaining 100 per cent attendance.

I do not know with what church Mrs. Taylor was affiliated.

In my teachings I taught with reference to Jesus Christ. I taught with reference to God. I probably did teach them the relationship between God and Jesus Christ. I taught that Jesus is the son of God, that Mary is the mother of Jesus, that Jesus had what you might call a foster father, Joseph. I don't know if you want to call it a foster father. We did not teach who Jesus' family was. We just said Mary and Joseph.

In speaking of Jesus I used the pronoun "he". We taught that Joseph and Mary fled with Jesus into Egypt, it is a Bible fact. They so fled until the death of Herod. In my teaching I referred to him as Jesus Christ. They were both names of this male child. I did not have to enter into any reason for his having two names. I did not have to with my pupils. I did not distinguish any difference between Jesus as a person and Christ as a person. When I speak of Christ or Christ Jesus or Jesus Christ I mean the same person.

I taught that he performed miracles. I did not explain it as being because of some relationship with God. I taught the children how he died. I taught them the cause of his death was crucifixion by the Romans.

During the first year I taught I might have given quite a bit of attention to his various trials, not this year nor last year. We had a different program and discussed it in a different way. I did not teach it differently in different years.

[fol. 123] Q. Then what did you mean it was different?

A. I mean the outline.

Mr. Franklin: I object to that, she is his witness and he has no right to cross-examine her.

The Court: I do not think it is improper. The objection is overruled.

The Witness: (Continuing.) The emphasis may have been different, the facts remain the same: I did not teach last year the trials of Jesus. I may have taught them several years ago but not the last two or three years. The document entitled "The Life of Jesus" is one of my outlines. That is Relator's Exhibit 1 for identification. The third page of Relator's Exhibit 1 for identification is not one of the outlines that I used this year. I might have used it two years ago. In the use of page 4 I do not think we ever got that far, referring to the trials of Jesus, but I just gave this to them. I would not say that these outlines were approved by me and my sponsors in teaching religious education. I think somebody else saw them, I do not remember who.

Q. I direct your attention to the second trial; that resulting in Jesus being condemned and being turned over to the Jews to crucify. Is that what you teach?

A. I think I need to explain that. They did not crucify him but Pilate washed his hands and said, "I will have nothing to do with it." But the Roman law was that no religious sect could crucify Jesus; it must be done by the Roman soldiers themselves.

I taught that the Jews did not crucify Jesus. I used this as typical Bible content. I taught them that various things happened at these trials. Nothing especially happened at the first trial. Caiaphas, the high priest, was not at the first trial. He was at the second one. I taught that Jesus was there accused by his enemies.

[fol. 124] Mr. Franklin: We object to interrogating this witness as to her knowledge or belief with reference to Bible matters.

Mr. Chapman: I am referring only to what she teaches.

The Court: That is what I understood.

Mr. Franklin: We object to the form of the question. He does not ask the witness that.

Mr. Chapman: The Court will observe that this is a hostile witness.

The Court: I will permit him to interrogate fully as to what she taught, not as to her personal belief.

Mr. Franklin: We do not join in the assumption that the witness is hostile.

The Court: I am not up to that question yet.

The Witness: (Continuing.) I do not think I spoke ever of the Jews as enemies; that was several years ago and I do not remember.

Q. Will you tell just what you did teach with reference to who his enemies were?

Mr. Franklin: I object to that. She said it refers to them as enemies. She does not believe she refers to them otherwise.

The Court: Is there anything you want to add to that answer, Miss Chapin?

A. I think if you read the Bible you will know them.

Mr. Chapman: Q. I want to know what you teach. Don't you teach that the Jews were the enemies of Christ?

A. They were hostile to Jesus in many ways.

Mr. Franklin: I move to strike the answer as not responsive.

The Court: The question was, is that what you taught. Or is that what you believe?

A. That is my belief.

[fol. 125] The Court: I will strike that answer as not material.

Q. Did you teach the children that the Jews were afraid of Jesus?

A. Some of them were.

Q. How about the others?

A. Some of them were not.

Mr. Franklin: I move to strike the answer as not responsive. The answer purports to tell who were and who were not afraid of Jews. The question was whether she

taught that some of the Jews were friends or enemies of Jesus.

The Court: Let the answer stand subject to explanation, perhaps, on cross-examination. Only counsel who asks a question can object to the answer as not being responsive.

Mr. Chapman:

Q. Have you during the last three years at any time been teaching that the Jews had anything to do with the crucifixion of Jesus Christ?

Mr. Peterson: I object to that question. I do not think anybody could answer it unless counsel says whether he means the Jews as a race or as part of an organization.

Mr. Chapman: Any way you want to take it.

Mr. Peterson: Any Jews did participate? That is another question.

The Witness (Continuing): Individual Jews did participate. I did not tell the children so, I did not mention it. In connection with the crucifixion of Christ, in my teaching during the last three years I mentioned that Jews were present at his trial and perhaps testified. I do not teach those doctrinal things. I just teach the Bible story and the paper you talk about, I have not used since several years ago. I have had such an outline. I have taught that some of the Jews accepted Jesus and that some of them rejected [fol. 126] him. I do not teach the pupils that the Jews were accepted or rejected but I may have stated that, but remember that those things are explained. If you use an outline an explanation is given to the pupils. An outline does not include everything.

Line 13 on page 3 of the exhibit says, "The Jews rejected Jesus." If does not mean as a people. It means individuals.

Mr. Chapman: I ask that the last part be stricken as not responsive.

The Court: It may be stricken.

Q. I call your attention again to the other line and will ask you to read it.

Mr. Franklin: I object.

The Witness (continuing): You are referring to the outline as to the conspiracy against Jesus?

Mr. Franklin: We object to his asking the witness to read it. It is an exhibit which if relevant or material to the issues of the case may be properly identified and introduced in evidence, but he is not entitled to attempt to get it into evidence by having the witness read it.

The Court: The objection may be sustained to read it aloud, but she may read it to herself and he may call her attention to it.

Mr. Chapman:

Q. Did you teach at any time within the last three years anything concerning the conspiracy against Jesus?

A. There was a conspiracy.

Mr. Franklin: Object, and move to strike the answer.

The Court: I cannot do that.

The Witness: It is my personal opinion.

The Court: Mr. Chapman is asking you only with reference to what you taught or did not teach in the schools, not what you believe.

[fol. 127] The Witness (continuing): I did not teach anything in regard to the conspiracy against Jesus. It may be on my outline but I did not emphasize it in any way. It is on the outline because it is an accepted outline. Sometimes we follow it, sometimes we use a part of it. I do not have time to use them all, occasionally. I do not know if the teachers under my supervision follow the outlines. I have made inquiries and found that they are not able to use everything I give them.

The outline contains a reference to the challenge to Christ but that was not discussed. I provided them an outline for work which they used according to their own ideas. I am pretty sure I never mentioned much about that in class myself. I do not remember saying who made the challenge to Christ. I would not necessarily remember if I did in three years, I do not remember everything. It is in the realm of probability that I could have taught it.

I taught the children in my classes within the last three years that the Jews called non-Jews gentiles. I do not remember teaching them any names that gentiles called people who are not gentiles. They were considered as Jews. According to the Bible content I believe that is true and that is probably what I taught. With reference to the teaching of death and resurrection of Jesus Christ I taught them that

Thomas doubted it, his resurrection. He was often called the "doubting disciple". I did not teach the children to make a difference of any kind between him and the other disciples because it was made all right by his seeing Christ and then he became a believer.

Q. As long as he did not believe it was not all right?

Mr. Franklin: I object to that.

The Court: Objection sustained.

[fol. 128] The Witness (continuing): That is my personal belief. I teach children that Jesus Christ really lived. I teach that he was a divine person. In my teaching as to what time he was resurrected, it is generally considered as Easter. We usually speak of his having died on Good Friday. It is my personal belief that life was revived in his body. I teach that he rose from the dead.

Q. By that you mean that a dead body became alive?

Mr. Franklin: I object to what she means. I object to what the witness may mean by what she says.

The Court: Sustained as to what she means.

The Witness (Continuing): That is not necessarily what I teach the children although the statement may be in the Biblette, "On the third day Jesus rose". The Biblette is a sort of game in which they have cards with questions. One person will ask the question, then they have a card for the answers of the children. The child that knows the answer or has the answer on his card rises, and the other child gives him the card. It is just a game. It is not gambling.

Q. Is there any difference between that and playing lotto?

Mr. Peterson: I object to that.

The Court: Objection sustained.

The Witness (Continuing): I also teach them that God was known by other names, sometimes called Jehovah, sometimes called Father. I have spoken of him as "Lord".

We teach that God caused the big flood upon the earth as an Old Testament story. We teach the Bible story which says that he drowned many people. I do not teach that he gave any of them a trial before he drowned them. I teach that he also drowned many animals at the same time. I [fol. 129] teach the story that contains it. I let the children interpret the story themselves as to whether or not it is a

true story. I give them the Bible content. I never mention that I believe.

I teach them that Jacob had what he called a struggle supposedly with an angel. That paper which you are referring to is just a paper that was given for them, simply checking. I think there was not much discussion. It was simply a method for them to decide, as I remember it.

I teach them that Adam and Eve were the first man and woman. In connection with that I do not teach anything about the age of the rest of the world to the children that I teach, the little children. They were the last of His creations. God created the earth and He created life. We never mention how long ago He created the earth.

Q. What do you mean when you say God?

Mr. Franklin: I object to that.

The Court: Objection sustained, as to her own personal belief.

Mr. Chapman: I will make an offer to prove that when this witness says "God" she means a creature of some kind which has supernatural proclivities and has dominion over the earth.

Mr. Franklin: To which we object.

The Court: Sustained. You are asking for her personal opinion.

Mr. Chapman: No, I am asking what she means.

The Court: You may go into the question of what she told them.

Mr. Chapman:

Q. What do you mean when you say "God"?

Mr. Franklin: We will object to that.

[fol. 130] The Court: Sustained; I overruled your offer of proof so far as it calls for her personal belief rather than what she taught the children.

The Witness (Continuing): I do not describe God to the children. I teach that he is our heavenly father. I think they understand what I mean by "Heavenly Father". I do not believe it is necessary to teach them what I mean.

Q. What do they understand?

Mr. Peterson: I object to that.

The Court: Sustained.

The Witness (Continuing): I teach that God created the earth. I think I taught them that some had a calling. Moses, for instance, had a calling. According to my teaching the Jewish nation had a calling.

I teach these children that Jacob had two wives. The Bible says that, they read the story. I did not mention that he had two wives, only as we read the story. I think that is in our outline. I did mention in my outline that Solomon had many wives. I taught that he was a wise man. I taught that God has qualities of love and guidance. I taught that God provided something like a miraculous defense in Egypt. It would not be in the outline if I did not intend to teach it. I do not think they always used the complete outline. If teaching the children the 23d Psalm includes it, I taught the children about the Lord being their shepherd. I taught them the psalm. I did not teach them anything from the 23d psalm that the Lord has anything to do with the children's wants. I did not teach them they should have no want because the Lord is their shepherd. I did have them repeat "The Lord is my shepherd; I shall not want". I usually taught from the King James version or the American Revised Bible. I do not teach from the [fol. 131] Douay version in my classes. I teach the number of books there are in the Bible, the Bible that we usually use in our Protestant work. I do not ever tell how many books there are in the Catholic Bible or the Jewish Bible. I teach them that the Bible is sometimes called the Holy Scriptures, or Writ, Holy Writing. I did not necessarily mean the Word of God. I teach them that the Bible is sometimes called the Word of God. I teach them at certain ages persons lived called prophets, that they could foretell future events. I taught them that Isaiah foretold the coming of Jesus. I do not teach them where he got that information. I teach them that Jesus can be alive, that he was baptized, I teach where he was baptized. I do not interpret his baptism, I just teach the fact. I teach that he was baptized by John the Baptist in the river. I do not teach why he was baptized. I don't teach them that he was taken down in the water. I teach that Jesus raised up people or restored people to life. I teach them that others have done that since that time; the Bible stories tell that Peter did. I teach that there are many heroes in the Bible; the main hero in the Bible is Jesus Christ. I teach that the main

theme of the Bible is salvation. I do not say anything about it to the children.

Mr. Chapman: I would like to make an offer of proof. I offer to prove by this witness that when she uses the word "salvation" in talking to the children she means salvation from sin, "salvation from sin that probably hasn't been committed."

The Court: I will let her answer subject to objection.

The Witness (Continuing): When I say the word "salvation" to the children I mean salvation from sin that we have committed. I do not mean "or will commit." I teach them [fol. 132] that Jesus died for our sins and that he died before we were born for our sins. If you want to have it that way, he died for our sins before we committed them, provision is made through his death.

I teach the children to respect and reverence God. Occasionally I teach them to say prayers. Perhaps two or three times during the year we recite prayers in class. The children do not participate in any prayers unless they are written. When they are written the children sometimes participate as a group. I teach a respect for all religions. I do not teach any religion other than the Christian. For instance if somebody may be a Buddhist I will teach the children that they should appreciate the good in that religion. If a child does not take my class because he does not believe in what I teach I teach the other children to respect him and I try to teach tolerance and world brotherhood. I do that by bringing up some interesting story. I teach the contents of the King James version of the Bible. We put the contents in a review and we take one place and another. I do not start with the first chapter of Genesis. Sometimes we take it from the Old Testament or we may take the idea of a character here or there and study it. I put them all together make a little compilation of all this material from the various parts of the Bible. The modern views concerning polygamy in religion have never been mentioned in my teaching.

I did not teach them about Brigham Young, the founder of Mormonism. When asked about Robert Ingersoll I probably mentioned only that he was a writer. I do not remembzer saying anything about his religious views. I do not remember having mentioned him. I may have. I do not know the religious views of Thomas Edison. I never told

[fol. 133] them anything about the religious views of Luther Burbank. The children were too young to understand the religious views of Voltaire. We did not discuss the religious views of Darwin.

I taught about faith. I think I taught that faith saved Rahab.

Q. What do you mean by the word "faith" where you use it in teaching?

Mr. Franklin: Object to the question.

The Court: She may answer subject to objection.

The Witness (Continuing): Faith means having trust or confidence in a person or thing. Rahab had faith that the words that were told her were good and true. I teach that faith is one of our Christian beliefs. I do not recall that I taught anything in regard to faith in connection with Thomas, the doubting disciple. He doubted, but that does not necessarily mean lack of faith. I taught that faith conquered Jericho. When I use the word "faith" sometimes I mean faith in God. I think it is clear in the children's minds when I mean it that way. We distinguish it. When teaching I do not qualify it. I take it for granted they know what I mean.

I tell the children Bible stories in class. I get the information from which I tell these stories from the King James version of the Bible and Bible story books. I might have explained passages in the Bible but I do not interpret them. I do not teach the children that David was able to kill Goliath because he had better armor and better weapons. I teach them that he was able to do so because of the skill he had gained during his days as a shepherd boy and his trust in God. I teach them that David sinned in taking Uriah's wife. I do not teach them that Nathan forgave him for that. [fol. 134] I teach that Jeroboam allowed golden calves to be set up in the shrines of Dan and Bethel. I teach the first commandment. The children learned it in brief. I taught the second commandment. I made no comment about "bowing down," as used in the second commandment. I do not think that I taught them what a graven image is. I showed them idols. I have been in China and I have shown them Chinese idols. I did not teach them some Chinese religion while doing it. I did not teach them Shintoism. I told them that Elijah departed this world in a chariot of fire. I did

not make any explanation where he went or where he got the chariot.

Sometimes I teach with pictures. I taught with reference to everlasting life that those who believe in God receive everlasting life. I do not say anything about those who do not believe in God. The word heaven has been mentioned in my teaching. I do not say that everlasting life means going to heaven. I do not think I mentioned Satan.

In my course, first I teach Bible content. I take the stories of the Bible and tell them as they are told in the Bible without any comment as to their interpretation, and I try to teach the ethical teachings. For instance, the Sermon on the Mount and teachings like that I try to get in their everyday lives, the solution of their everyday problems. I also try to teach the brotherhood of man and the fatherhood of God; I also try to teach them that they can interpret, each in his own way, the scriptures. I do not teach that the brotherhood of man is the same as equality of religion. They are not equal to me.

With reference to applying the Sermon on the Mount to everyday life, Jesus gives us many teachings in how we are to treat each other, the line that he would have followed in kindness and love and all of that. I try to teach them that, [fol. 135] how to deal with others in the way of life and forgiveness. I do not recall that I have tried to apply the Sermon on the Mount to any present day social evils. I do not remember that I ever taught anything with reference to it being as difficult for a rich man to go to heaven as for a camel to pass through a needle's eye.

I had the words "everlasting life" in my outline.

Q. When you used that word in your teaching, what do you mean by it?

Mr. Franklin: We object to that.

The Court: She may answer. I would be inclined if this was being tried before a jury to sustain the objection, but since this is before three judges, we will try to eliminate what is incompetent in our own minds, but we are inclined to be very liberal in the admission of the evidence.

Mr. Peterson: Is it agreeable that any objection made by either of us representing the intervenors or the Board of Education may stand for both?

Mr. Chapman: That is agreeable.

The Court: It may be so understood in the record.

The Witness (Continuing:) I do not think I have ever made a complete explanation of everlasting life in my teachings because I think the children are a little too young to understand it, but I may have said that everlasting life means that we live for evermore. I do not explain it as meaning that we as humans live for evermore, but rather that whatever is God's plan will come to pass. I try not to use words that they cannot understand. They have to know what I am talking about so they do not have to go elsewhere to find the answers. We teach the life. I have never been asked to explain so I don't know that they did not understand what I meant. I teach that there is resur-[fol. 136] rection of the body but I have never gone into any detail about it. By that I mean the dead body comes to life. I teach that the Book of Genesis has religious value. I teach that animal sacrifice was accepted in the Old Testament as part of the religious ceremonies of the Israelites, that God did not approve of human sacrifices. I teach that Abraham's offer to sacrifice Isaac was just a test of Abraham's obedience. I do not teach any reason why God needed this test, just as a fact.

I know some of the doctrines and teachings of the Presbyterian Church. In the religious education that I teach there is no conflict with the teachings of the Presbyterian Church and its doctrines as I know them. To my knowledge what I teach is not in conflict with the doctrines or belief of principles of any other denomination. I do not know whether they are in conflict with the Free Thinkers. I have never come in contact with them. If I taught doctrines that were contrary to mine I did not know it. I realize there are other doctrines than those of the Presbyterian Church. I do not teach doctrines, I teach content.

Cross-examination.

By Mr. Franklin:

I teach religious education in the public schools, in the public school buildings. I do not teach in the public school program itself. I referred to the fact that there are classes taught by Catholic priests in the school district as part of the religious education program. I have sent the cards of the Jewish children who registered to the rabbi who has to make arrangements for them. They are not in my classes. Not only the Protestant churches are members of the Cham-

paign Council of Religious Education but also the Catholic church and the Jewish churches cooperate as members. I am referring in my testimony to what I taught the children [fol. 137] in my classes, I was not referring to the teaching of what I myself believe but to the content of the Bible.

Q. Have you ever urged on the children in your classes any particular belief other than as stated in the Bible that you used?

A. No, sir.

Mr. Chapman: Objection. It calls for a conclusion as to what she urges.

The Court: Objection overruled.

The Witness (Continuing): I have never practiced proselyting in connection with any children coming under my care and jurisdiction, nor have I ever attempted to form or change any children's belief from one denomination to another or from any religious belief to any religious belief or from another religious belief to my own. So far as I am acquainted with the way in which these classes are operated in the public school system, in the religious education classes none of the teachers do that to my knowledge. I have never attempted to induce students registered in the public schools to take the religious education classes. I have never used any form of social pressure or coercion in accomplishing that end. I have never to my knowledge observed anyone else doing that in connection with the religious education classes, nor have I ever observed any teacher in the public school system do or attempt any such thing.

I graduated from Champaign High School and the University of Illinois with a degree of Bachelor of Arts. I studied one semester at the University and had my Master's degree. I have attended the Presbyterian Training School in Chicago for about five or six months, and also attended the Biblical Seminary in New York. When I was in college I took Bible classes in the University. After graduation [fol. 138] from the University of Illinois I went to Indiana and taught English and history in the high school for two years. That was an accredited high school. I have a certificate as a teacher. I went to China in 1913, and after two years I became principal of the Memorial School. I was principal there off and on for about twenty years. Then I went to Manila where I was principal of the Union High

School, a school supported by several different denominations. I was also director of religious education there. Then I had a course of work among the American Indians. In Chicago I worked at Association House for eight years and taught Bible classes there.

In my work in these religious education classes I do not attempt to advance the belief or cause of the religious denomination to which I belong. It is the policy of the Champaign Counsel of Religious Education that no denominational belief shall be taught. As far as I know, that policy is strictly adhered to.

I have had occasion to participate in religious work in churches other than my own. I have been to a great many of the denominations in Champaign and outside of Champaign to give talks on my missionary work in China and in the Philippines. When I was in Chicago in settlement work I taught in the Methodist Sunday School and in the Plymouth Church, which was a Congregational Church.

Q. Has there ever been a time during your work in these other churches where anyone has felt that you were untrue to your beliefs?

A. Not to my knowledge.

Mr. Chapman: Objection.

The Court: Sustained.

The Witness (Continuing): No child in these classes has [fol. 139] ever complained to me or indicated that what I was teaching was contrary to what his or their own religious belief was. In substance, it was my intention to teach these children the brotherhood of man, the fatherhood of God and the practical application of the ethical teachings of Christ, and of the pupils' everyday life.

I do not know whether or not the teaching of these classes has any effect upon the children who take the classes, but one day while I was walking down the street a mother came up to me and said, "I cannot begin to thank you for what you have done for my boy." As far as I know, my teaching is generally well received by parents. I have never had any objection. I hope that children who come under the influence of these religious classes are better children as a result of it. In one class where we taught of the prodigal son one of the boys came up after class and said he was glad he had gone, that he had decided to run away from home, but then decided not to. One girl came to

me after class and said, "Before I came to your class I had a problem, but now it is solved." In these classes I do not teach the differences that exist in doctrinal belief, opinion or denominations. My attempt and hope is that each one will remain in the particular faith to which he or she was a party and to be a better citizen by being a better Christian.

Redirect examination.

By Mr. Chapman:

By being a better Christian I mean to live a better way of life, be more like Jesus, to be more Christ-like, follow more closely His teachings. The term "Christian" is applied to one who believes in Christ.

Q. That is the way you understand it?

Mr. Franklin: I object to what her understanding is.

[fol. 140] The Court: Overruled.

The Witness (Continuing): The term "Christian" is applied to one who tries to follow the principles that are put down in the Bible, a belief in Christ. What would it mean if it does not mean that? I am not changing my testimony. I mean a Christian is one who believes in Christ.

I do not teach the difference in beliefs. I am familiar with some of the beliefs of the Baptist church. I know something of the doctrines and teachings of the Christian Science church. I am not particularly familiar with the teachings of Jehovah's Witnesses. I am not particularly familiar with the Free Thinkers.

Q. On what fact do you base your testimony when you say that you teach factual material and nothing that is doctrinal?

Mr. Franklin: We object to his cross-examining his own witness.

The Court: I will overrule the objection.

The Witness (Continuing): I would like to give an instance. I teach the facts of the Bible, the Bible story.

Q. I am asking you on what facts you base your testimony or give your opinion or belief that you do not teach anything that is doctrinal.

Mr. Franklin: Object as argumentative.

The Witness: I do not understand the question. I stated that I do not teach anything that is doctrinal because I teach

what the Bible says but with no interpretation of its content. I do not teach anything that I do not believe in myself. I take the position every religion is good. I believe in the essential part of the doctrines of all religions. I do not know that polygamy is an essential part of religious doctrines at the present time. I know it used to be. If it [fol. 141] should happen to be a doctrine of a religion I would not believe in it.

Mr. Franklin: I object to that.

The Court: Sustained. We are getting afield from the matter of the issue of what is taught in the schools.

The Witness (Continuing): With reference to the teaching of Christian Science, I do not know whether or not they believe that Jesus was a man who walked on the earth.

Q. You do not know then if they have the same doctrinal principle or not, do you?

Mr. Peterson: Objected to as argumentative.

The Court: Sustained to the question in that form.

The Witness (Continuing): I do not teach any of the Chinese beliefs in religion. They are quite different from the Christian doctrines. I taught among the Indians for a few months. I did not especially teach them religion. I was head of the dormitory, matron. I taught religion to the Chinese.

Q. Was the religion that you taught them different from the religion that you taught in the Champaign schools?

Mr. Peterson: I object.

The Court: Sustained.

The Witness (Continuing): I and those under my supervision did not teach religion in all the public schools in Champaign and all the grade schools in Champaign. We teach in the buildings but we do not teach the first, second or third grades. We teach in all the buildings, except one school.

Colored and white children attend some of the same schools in Champaign. I think there are schools that are all colored. There was one teacher assigned to them; after that we had two classes. That was Mrs. Jorgensen. She [fol. 142] taught religious education for the colored school. The teachers under my supervision are engaged by the personnel committee of the Council of Religious Education.

I assumed that I had some results of my purpose in teaching religious education. By purposes I mean that the boys and girls live a fuller and a better life. For instance, if a boy had been doing something wrong, and through the study of the Bible he decided he would give it up, I think that would be a result. Some of the children changed when I gave them these religious education courses. I already stated the instance of the girl who said that she was tempted to do something, but that her problem was solved and she did not do it, and of the boy who said that he was contemplating running away from home and then decided not to do it. These were things they told me.

Recross-examination.

By Mr. Peterson:

I did not teach any Chinese pupils in the schools here. I have not encountered them in this country.

Mrs. Lakie B. Munson, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Lakie B. Munson, 412 West Church Street, Champaign. I am a teacher in the Champaign Junior High School. I have been teaching in the Champaign public schools for sixteen years. Last year I taught at the Dr. Howard School in Champaign. I was principal there. Miss Chapin taught religious education there last year. I myself taught grade 6. She taught religious education in my class [fol. 143] room. I was not present at the time. I was taking care of the children who were not members of the class that were taking instruction. Religious education began in my class room at 9 o'clock. With the children who did not take the course I was in the office having regular class work. I took them into an office adjoining the class room.

Q. What happened to the students you abandoned to Miss Chapin?

Mr. Franklin: Objection.

The Court: Sustained.

The Witness: (Continuing.) I did not abandon them. Those that did not leave the class room and come with me I presume stayed in the class room. I was busy with my group. I left the class room because that was the time set aside for religious instruction for that particular group. That time from 9:00 to 9:30 was set aside for religious education in my class room by agreement between myself and Miss Chapin prior to the institution of the class. The program works this way: In the bulletin we are advised that the religious education teacher will appear in the building prior to 8:30, the official school time; that is when the first bell rings, to confer with the principal and teachers as to the time they find it will fit best into their program, so that it will in no way interfere with the regular secular subjects. We set the time the teacher will be there. My time was set as 9 o'clock each Monday. I cannot use the word "authorized" by the superintendent. That was instituted several years ago. The only directions which we received from the superintendent each year were that the teachers of religious education for each building would present themselves and work out a program. The infor- [fol. 144] mation usually came from the office of the superintendent. It has during the last two years.

I began teaching at 9 o'clock in the morning and closed at 3:15 five days a week except holidays. There are around twenty teaching days a month. I am paid by the month. My salary as a teacher is not based upon the number of hours I teach. I come in at 8 o'clock in the morning and leave sometime between 4:30 and 6:00. In grade 6 I estimate I spend in the class room teaching between 295 and 325 minutes, based on 30 minute periods. Last year I believe I taught four classes on Monday morning.

I have not talked to anyone about this case before coming up to testify today. I know of this lawsuit through being served with a subpoena and through the newspaper. I might have discussed the case with my family.

Mr. Peterson: I object to his questioning his witness this way.

The Court: Objection sustained.

The Witness: (Continuing.) The average school day is five hours and 15 minutes in the sixth grade. That is the average period of giving instruction in my class room for the average monthly salary. My room is used for

thirty minutes for religious education. I do not teach overtime to make up for that time. I do not have a special class of my own for those children who are taking religious education. On Tuesday morning when there is no religious education class from 9 to 9:30 I teach arithmetic. The same on Wednesday. If it were not for religious education on Monday we would have arithmetic on Monday. I do not omit the arithmetic class every week on Monday. A class or a subject is never omitted even though thirty minutes out of the fifty minute arithmetic class might be taken on Mon- [fol. 145] day morning. We have a ten minute leeway which is given for opening exercises or whatever the teacher may choose to present at that time. Our program is supposed to start at 9 o'clock. I would take the children who were not members of the religious education class and we were out of the room and on our way to the office at 9 o'clock. As I brought my group out Miss Chapin stepped into the room and took over; she was in there thirty minutes. Our program is flexible. We do not teach a subject according to the minutes of the day and hour. It is just a matter of time, and is simply a guide mark. I might run over in arithmetic some day five minutes. I may have that lesson under control and be able to get it done in ten minutes. We are teaching subject matter, not time. Very often I will find I am running over five minutes on English, which would normally follow arithmetic, and I just take a little more, maybe five minutes, off this subject, but I do that constantly, any teacher does who is teaching boys and girls and not running a schedule. I do not mean by this that I slight arithmetic. I slide down because of religious education. I can pull the thirty minutes off against all the subjects, and I do that constantly whether it is religious education being taught or something else. We must do that. The children that go to the office with me do not get more education, more instruction, or more of my attention and time than those who stay in and take religious instruction. There are always those who need much more of the secular efforts, extra help. During religious education I have an excellent opportunity to help boys and girls who perhaps need help on a specific subject, maybe spelling, maybe arithmetic, maybe English, maybe counselling, but there is nothing given more by being [fol. 146] there thirty minutes than what I find time for ordinarily in the class room to give those same boys and

girls. I have no way of knowing whether these children who go out of the class room at the time of religious education are persons whose parents do not agree to them taking the religious education. I do not distribute cards among parents as a means of finding out who wants to take religious education. I have nothing to do with that, I assume the religious education teacher does.

Q. Do you mean that you surrender your whole class room to this religious education teacher?

Mr. Franklin: Objection.

The Court: I think I know what Mr. Chapman is seeking. Maybe you could reform or rephrase it without using the word "surrender." I will allow you to ask that, of course.

The Witness (Continuing:) I never make inquiry as to why some five or six children leave the religious education class. That is not my job. That is voluntary. I have no idea why they are not members. I do not know what you mean by "dumb" when you ask whether it is just the dumb ones that go out with me to study during the religious education class. They are not ones who are behind with their studies or whose grades are low. Sometimes brilliant pupils need help. If you mean do I take out with me only those children who are low in achievement my answer is no. I take those who do not want to take religious education. There is always work for those children to do. I can find it for any group.

I do not spend 30 minutes more each week with them than with those who take religious education. As teachers we work with children and individuals, not a mass. I have completed my individual work with those who are with me [fol. 147] in those 30 minutes. I therefore can set them to work and go back to others and take care of — that have not had 30 minutes. They have not had 30 minutes more than my boys and girls who are not with me in the office. Sometimes on Tuesday I take out two or three from the class. I do not leave the class for thirty minutes, nor on Wednesday or Thursday or Friday. Sometimes I may take more out on those days for other purposes. I do not take students out of the class room at 9 o'clock on Tuesday morning as on Monday, but I might take them out at 2 o'clock. Quite frequently I take five or six or eight or nine students out of my class to the library for special work.

I do not leave the rest of the class room for thirty minutes, maybe not that long at one particular time.

It is a fact that at 9 o'clock on Monday morning I leave my room because Miss Chapin comes in to teach religious education. After she teaches my room she goes to the other sixth grade. I was principal there, the other teachers were under my supervision. If they were not following instructions I was not aware of it. When Miss Chapin went from my room to the next room the sixth grade teacher followed the same procedure. She was directly across the hall where I pass her in and out. She did not take children out. They were not members of the class which was held in the room at that time. They walked out voluntarily when she went out. After the religious education class was finished she went back there and the other students came back there. The religious education class did not stay there after closing time. I separate four or five or six from the rest of the class on occasions other than for the religious class, whenever there was any type of special work in the library. I did not select the same ones [fol. 148] who left the room when Miss Chapin came in. I did not have occasion to take them out of the class room at other times, the same ones.

After Miss Chapin finished the other sixth grade class she went to the fifth or fourth, I don't know what her schedule was. Mrs. Taylor and Mrs. Johnson were teaching in the fifth grade. I don't know whether Mrs. Taylor left the class room when Miss Chapin came in to teach. Mrs. Taylor was under my supervision. Most of the time I took notice whether she was teaching or not. I do not know whether she left most of the time or did not. I know that Mrs. Johnson left the class room when Miss Chapin came in; she had a library group operated along the same lines as I worked in the office. She took her group down to the library to study there, to study special work, and she worked with the students during that thirty minutes. All the time that Miss Chapin was teaching religious education in the Dr. Howard School that same building was being used for regular classes. I never touched the cards which were sent to the parents. I had seen them. I noticed Miss Chapin passing through the hall with them in her hand. I presume she distributed them during religious education time. I did not distribute them or deliver them. I was teaching here when the religious education was first in-

ducted into the school. I would not say that I always took a group of students out of the class room each Monday morning at 9 o'clock but I have always followed the practice of doing specialized work with a group. I never distributed any of the cards when the religious education first began.

During the period when they were under Miss Chapin they were not out from under my control. Had anything [fol. 149] developed I always had the privilege of returning as the class room teacher; for discipline if necessary. I never experienced the feeling that I would not be allowed in there.

At the beginning of the school year we have new students. Usually they just hear about religious education. Sometimes if they have ever taken the subject and come into our school after class is instituted they see me about taking religious education. I might ask a group if they were members of the class. Someone might say he was taking it and I might tell him to go in there. I would let him go to Miss Chapin, who takes care of him from then on.

When Miss Chapin is teaching religious education to the group the others who do not take the course are not expected to go out to play. They never have in my group. I do not send them home during that 30 minutes or send them away from the building. I do not permit them to leave the premises during that time.

Cross-examination.

By Mr. Franklin:

It is my practice to teach individuals as individuals rather than as a class. I attempt to give as much time to each individual boy or girl as the particular requirements indicate.

Q. Is it true that you believe each of your children should receive the same amount of your personal time and attention with the religious education classes in the school as they would receive otherwise?

Mr. Chapman: Objection to the belief.

The Court: She may answer whether in her judgment that is true or not.

The Witness (Continuing): It is in line with my judgment, it is the fact. None of the children lose any of my [fol. 150] personal attention or instruction as a result of

taking religious education. There is ten minutes of each day or fifty minutes a week set aside for opening exercises, or such uses of a non-instructional nature as I choose to make of them. That is true throughout the school system in Champaign. There is fifty minutes of time in the week about which there is no provision for use in the regular public school course. If thirty minutes is used for religious education there is still twenty minutes of unassigned time.

Cross-examination.

By Mr. Peterson:

Each pupil obtains full instruction in each subject taught in my school in each week during the school year. They lose absolutely nothing as far as instruction is concerned by some of them atending these classes. In school we sing the National Anthem. The Star Spangled Banner is sung, also America. In singing them we do not omit that part of it which says "In God We Trust".

Redirect examination.

By Mr. Chapman:

I do not expect all of the students to sing that part "In God We Trust". I presume that they do not participate in that if they do not want to. We never make any comment. We have never asked them to sing when that is being sung. Nobody ever refuses to sing it.

When I speak of individual instruction I mean in cases where a period may be divided into a study period, an assignment period and a recitation period; with children who are studying you may be working with this one or with that one or somebody else on the arithmetic or English. It is [fol. 151] not a place where we come in, sit down, look at the clock and say it is time for arithmetic, then teach arithmetic for fifty minutes, look at the clock and walk out. It is flexible and is divided into different types of active study and recreation. We are able to arrange our schedule so that religious education does not detract from the services we give the student. I am being paid to teach boys and girls. I cannot say who of the students take a great deal more of my time than others. I would not say those who need it most get the most. I do not necessarily mean that these

who do not take religious education need more of my attention than those that do.

I remember talking to you about this subject once before. That was in the office of the Dr. Howard School.

Q. Do you remember telling me and several others present that on Monday morning you took out thirty minutes from arithmetic—that is, you were behind thirty minutes in opening the Monday class?

Mr. Franklin: Objection.

The Court: Sustained. Is this an attempt to impeach your own witness?

Mr. Chapman: This is a hostile witness.

The Court: I will allow you to ask leading questions but I do not believe you can impeach her.

EUGENE HARVEY MELLON, called as a witness on behalf of relator, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Eugene Harvey Mellon, 601 W. John, Champaign, Illinois. I am superintendent of schools of Champaign, District 71. Miss Chapin teaches religious educa-[fol. 152] tion there. I have been superintendent about 2½ years. In our bulletin I probably stated, "Teachers and principals will make arrangements with the religious education instructors, the music supervisors, art supervisors and all other pepole who have work to do in the schools, other than the regular class room teachers." Art and music are not given every day in our grades. Art and music might be taught by each teacher. I am speaking of the art supervisor and the music supervisor who comes in for special classes. Religious education would come in a similar manner. That is the system which was already established when I became superintendent. Before children take the course, cards are sent to their parents for permission. They are not distributed through my office. Sometimes my office would mimeograph the cards. They are paid for by Miss Chapin. The mimeographing would be done by the office clerk. She is under my supervision and paid by the school board.

I know who teaches religious education in the schools. I do not determine who those teachers are. During the last year or two Miss Chapin told me who was going to teach. I made no objection to her teaching in the school nor have I ever objected to anybody teaching in the schools. The schools are open to all denominations who want to teach in them.

Q. If two or three people should appear next Monday morning at Miss Chapin's room to teach religious education in her class you would permit them to teach?

Mr. Franklin: Object to suggesting any such hypothetical condition.

The Court: Sustained.

The Witness (Continuing): The schools are available to Christian Scientists if they want to conduct the class. It [fol. 153] would not be practical for them to teach in the same room at the same time as Miss Chapin teaches. It would be done in another room. I would permit Jehovah's Witnesses to use the class rooms once a month for the purpose of teaching if the person was qualified to teach properly. The board has the unwritten reservation that the person should be qualified to teach. We would want a qualified person who would know the correct usage of the English language, who would teach in proper English, use good grammar and language; in other words, of the same general type and do the same general type of teaching that a class room teacher would do. I would not consider what religious denomination he belonged to.

Q. If he taught polygamy would that be all right?

Mr. Peterson: Objection. Polygamy is not recognized in the United States.

The Court: Sustained.

Q. If he teaches that saluting of the flag is wrong?

Mr. Franklin: Objection. We are not called on here to pass on hypothetical situations.

The Court: Sustained.

The Witness (Continuing): The class room is available to people who teach religion to the effect that saluting the flag is wrong, but they have never asked for it. Each principal and teachers in that building work out the schedule to determine which class rooms are available.

Q. I will ask you if you will now designate a class room for Jehovah's Witnesses.

Mr. Franklin: Objection. We do not know just what he refers to as Jehovah's Witnesses. If proper application is made to the school board they will certainly give it the con- [fol. 154] sideration which it deserves, the same type of treatment that every other religious sect or denomination receives.

The Court: Objection sustained.

The Witness (Continuing): As far as I know, the class rooms are available to a person who believes in no religion. They are available for the use of political parties during school hours.

Q. Do you mean to say that the schools are now available to all the churches in the city, and school buildings may be used by all of them while they are being used by students?

Mr. Franklin: Objection. He has not said that.

The Court: I will sustain the objection in that form.

The Witness (Continuing): The school buildings are now available to all religious denominations in this community to be used while they are being used by students. I am opening up these buildings to all these people with the permission of the board of education. I have not given any thought to whether the schools can furnish sufficient space for all denominations to teach during school hours.

Cross-examination.

By Mr. Franklin:

I mean that I would allow a denomination to come in and teach in a room where secular classes were being carried on, class rooms which were not at the time required for students, while other rooms are being used by public education classes. The school buildings have been used for political meetings. Those meetings have been attended by other than school children. They were used when the school was not in session and the political party met. It would not be practical to have adults come in in large [fol. 155] numbers for political meetings during the time that some of our rooms were being used for educational purposes. It is upon that basis that we exclude them during the hours in which the school is in session. That presents

a different problem to me as an educator than the form of religious education classes to be held in the public school buildings. The religious education classes are held in orderly fashion; in the class room we would have to set aside a complete room to have an adult meeting. Jehovah's Witnesses have used our high shool swimming pool for baptismal purposes. They were readily granted that permission and without anty rental. No other application to my knowledge has been made by Jehovah's Witnesses for use of the property under the control of the board of education and of course none has been refused. The Superintendent of schools in Champaign preceding me was V. C. Nichol, who is now Superintendent of Public Instruction of the State of Illinois. These courses were inaugurated during his term as superintendent.

Redirect examination.

By Mr. Chapman:

If a church sent a religious education teacher and had only one or two students they would move out to a smaller space and would leave the class room for the large group that stayed. If we had a large group the smaller group would move out and let the religious education in.

[fol. 156] JOHN GEORGE KAISER, called as a witness on behalf of the relator, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Chapman:

My name is John George Kaiser, 310 E. University Avenue, Champaign. I am pastor of St. John's Lutheran Church of the Missouri Synod. I have been acquainted with the religious education system in the public schools of Champaign from the beginning. The system first came to my attention at the organization of this religious council. Pastor Cartlidge of the First Presbyterian Church consulted me about the formation of this council for the purpose of religious education in our public schools. That was some three years ago. I did not attend any of the meetings of the council until this past summer. I approached the

council to grant to the Roman Catholic people and other people of that faith in our community their separate instruction, and also to the people of the Jewish faith, or the reformed orthodox church had an instructor. They would permit a flexible program, exceptionally so; they would allow these children of the Lutheran faith to receive instructions according to that faith. I have not as yet arranged to provide a teacher. That was very late in June of this year at a meeting in the First Methodist Church. I presume those present were members of this religious council. There were between 15 and 20 persons present. When I offered this suggestion no action was taken on the part of the council, but I was assured that if and when there were sufficient children desiring instruction according to the Lutheran faith, time would be granted us. Of my church I estimate there would be probably 50 to 75 children in the various [fol. 157] schools in Champaign and Urbana. It is difficult to estimate how many in each since my parish covers both cities. I cannot estimate whether it would be about half and half but the larger number would be in Champaign. I have not made application to the board of education of School District No. 71 in connection with this matter nor have I pursued it any further than the religious council. That is because I believe sufficient children must be in an individual school who desire Lutheran instruction before the board of education acts. I do not know how many there would be. The Lutherans do not now have a teacher of religious education in the public schools of Champaign.

I am familiar with the doctrines and teachings of the Lutheran church. I heard Miss Chapin testify. Miss Chapin testified that she teaches the children that Jesus Christ is a man who walked upon the earth. That is only partially in accord with the principles as used in the Lutheran church. The divinity of Jesus Christ is omitted. Generally speaking, her teaching that everlasting life means life for evermore and that dead bodies rise, become alive again, is in accordance with the doctrine and usage of the Lutheran church.

Q. She says she teaches that Rahab was saved by faith and by faith she said she meant in a thing or person.

Mr. Franklin: Objection. That is not a fair question or exact statement of what she said.

The Court: Objection sustained.

Q. Will you state the doctrine and teachings of the Lutheran church in its attitude toward that story?

Mr. Franklin: Objection. This suit does not require an expression or statement of all or any of the representatives of the different faiths of what they believe in.

[fol. 158] Mr. Chapman: One of the chief issues of this case is whether or not this religious teaching is sectarian. The only way we can tell that is to compare them with the doctrines and teachings of the various sects. We want to know if they are all in accord with the teachings of other denominations.

The Court: Pick out the particular thing she said and I will permit you to interrogate—not word for word but the substance of it.

The Witness (Continuing): I do believe that our individual beliefs compared with Miss Chapin's statement are not relevant since our Lutheran church has for years carried on its own religious instruction in Champaign for the children of the congregation, and therefore we did not participate in religious teachings in the public schools. We have our own school for teaching religious education on Saturday morning.

Q. So that the teaching of religious education in the schools during the school day does not harmonize with your practice?

Mr. Franklin: We object to that.

The Court: The word "harmonize" is objectionable.

Mr. Franklin: That is absolutely invading your Honor's province.

The Court: The objection will be sustained to the question in that form.

Cross-examination.

By Mr. Franklin:

The objection I made to what Miss Chapin testified to regarding the nature of Jesus Christ was only because she did not include a reference to his divinity in describing him as a human being who once walked on this earth. It was not her omitting that, in that she said something that I do not [fol. 159] believe in, but that she did not state the whole of what I believe in and also the Lutheran church believes in

the humanity of Jesus Christ. She spoke of just one phase of his character or nature and we say there are two phases to it.

Redirect examination.

By Mr. Chapman:

Q. Would you say that the views of the Lutheran church harmonize fully with Miss Chapin's statement with reference to the divinity of Christ?

Mr. Franklin: I object to that question as not relevant.

The Court: Let me ask if the school board is raising any contention that as to the religion taught there are differences in creed and belief between those who are already engaged in this religious education program, including Jewish, Catholic and various Protestant faiths.

Mr. Franklin: No doubt or contention, but they say different religious groups entertain different religious beliefs. That was not raised.

The Court: The objection to the question is sustained.

HAROLD E. BARCUS, called as a witness on behalf of relator, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Harold E. Barcus, 1514 W. Healey, Champaign. My primary occupation is that of preaching the Gospel of the Kingdom. I work as a floor covering mechanic. [fol. 160] I am affiliated with Jehovah's Witnesses in Champaign, Illinois. I am Company servant of the Champaign, Illinois, Company. The Company servant holds the position of an overseer or captain or chief commission, in any certain locality. I am familiar with the teachings and doctrines of Jehovah's Witnesses. I have spoken to Mr. Mellon since he testified here a few moments ago. Our counterservant, T. E. Wells, was present and somebody else of the religious council. We approached him with the idea of getting time in the public schools and also a place. They said it would be possible but we would have to go through the regular procedure.

Q. Did he grant you permission to use the school?

Mr. Franklin: I object. He may state what was said.

The Court: Sustained.

The Witness (Continuing): That is the essence of what was said as I remember it.

Q. Will you tell what the doctrines and teaching of Jehovah's Witnesses are with reference to the divinity of Christ?

Mr. Franklin: I object.

The Court: We will hear it subject to objection.

The Witness (Continuing): We believe that Jesus Christ was in the beginning with God, a spirit creature; that he became a man; that he was not part man and part spirit because in that sense of the word He could not have given the perfect price for mankind, because it required a perfect human life, so He became man; that as a man He walked upon the earth; He was crucified, and raised from the dead on the third day; that He gave His blood and body for the salvation of all who believed on Him. Then that he rose to heaven in the spirit but that He did not rise from the [fol. 161] ground in the flesh, but that He rose as a spirit and assumed the fleshly body on certain occasions.

Mr. Franklin: We move to strike the answer.

The Court: For the time being I will let the answer stand.

Q. Will you tell us of the doctrines and tenets of Jehovah's Witnesses with reference to the resurrection of the physical body?

Mr. Franklin: Objection.

The Court: The same ruling. Mr. Chapman, you are not going into the minutia of faith and doctrine of all the different denominations, are you?

Mr. Chapman: Just a few. We want enough to show clearly and distinctly that there is a difference.

The Court: You may do it for that purpose, subject to objection.

The Witness. (Continuing): That is quite a lengthy discussion if every point was brought out, as to whether we teach revival of the physical body after death. There are two classes who receive resurrection; one is the body of Christ, and until taken out of this world and as a people by His name, and they are revived in the spirit only but not in

the flesh. There is also another class mentioned in the Bible. They are also mentioned as standing before the throne of God, some of those who have died in the past, who lived and died—for instance, before the time of Christ, before he was down to prepare the way for whose who enter into heaven. For this righteous class we hear of Abraham, Isaac, Jeremiah, John the Baptist, because the Scriptures plainly teach life in the Kingdom of Heaven.

The teachings do not include that all physical bodies, the human race, will die and will be resurrected in the flesh. There will be two classes, those in the body of Christ will be [fol. 162] heavenly and absolute, and those who will acquire the body celestial, and some, the rest, will be quickened of spirit; some are raised and quickened, and can live in the flesh. We believe in the Kingdom of God, and Christ, and that it will be as it was on earth before, as Christ told or foretold before.

EUGENE HARVEY MELLON, recalled as a witness on behalf of relator, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Chapman:

Q. What is this regular procedure through which people must go in order to obtain the use of the school house, such as Jehovah's Witnesses?

Mr. Franklin: I do not believe this is the forum in which to go into the merits of the application of Jehovah's Witnesses. They have not been denied and will not be.

The Court: Objection sustained.

Mr. Chapman: I offer to prove by this witness that he has a procedure by which people must apply to the religious council in order to get permission to use the school building and they work in cooperation with the religious council.

The application has been made now.

Mr. Franklin: I will withdraw my objection.

The Court: I will allow him to answer the question.

The Witness (Continuing): The regular procedure, I said, would be in my office sometime, and I would not discuss it here. In the regular procedure for obtaining the

use of the school buildings, I would like to have the names of the pupils and the schools in which they are located, and [fol. 163] the number of pupils; that would have to be taken care of in my office. I am a practical person. I would like to know, before I would grant permission to Jehovah's Witnesses to use the school buildings the number of persons in the school and also to make regular arrangements.

Q. If there would only be a few students would that make a difference?

Mr. Franklin: I object to that.
The Court: The objection is sustained.

Q. While you were talking to Mr. Barcus a few minutes ago did you inquire of him as to how many children would be interested in such a course?
A. I did.

Mr. Franklin: I object to that.
The Court: Objection sustained.

Q. Did you inquire as to where those children were?

Mr. Franklin: Objection.
The Court: Sustained.

Mr. Chapman: I offer to prove by this witness that he asked Mr. Barcus how many there were and where they were.

Mr. Franklin: Objection.
The Court: Is that the whole offer?
Mr. Chapman: Yes.
The Court: Objection sustained.

The Witness (Continuing): I did not know who Mr. Barcus was when I talked to him. I recall talking to him a few minutes before he was on the witness stand. You were present, Mr. Barcus and another gentleman whom I do not see and whose name I do not know. I said we would want to know the number of Jehovah's Witnesses pupils and what school they were in and where they were located. I do not recall anything further said at this conversation.

[fol. 164] Q. Was anything said about these people having applied very many years ago.

Mr. Franklin: Objection. This is impeachment of his own witness.

The Court: You may say if there was anything else said.

A. There was another gentleman present who was trying to explain to Mr. Barcus the orderly procedure, and that all of the groups should work together; it was hard for us as a board of education or as a superintendent to work with a lot of different groups. That may not be just exactly what he said but that is all I can think of.

DELOS L. HUXTABLE, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination,

By Mr. Chapman:

My name is Delos L. Huxtable, 410 West Clark Street, Champaign. I am manager for Beatrice Creamery Company. I am president of the school board. I know there is religious education being taught in the schools of Champaign. According to the minutes of the school board they were granted permission on June 6, 1940. There were present Mrs. Damon, the president; Mr. Dallenback, Miss Kelley, Mr. Nichol, the superintendent, and the clerk. I am not sure about the rest. The meeting was held in the junior high school. We agreed to cooperate with reference to teaching religious education in the schools. The Protestants would have one group and the Catholics, and would be given a room where they would have the class and we would go along with the plan of the religious people. They [fol. 165] were all to be treated alike, with the understanding that the teachers they would bring into the school were approved by the superintendent. They would have to be approved by somebody else because they were hired by somebody else. The superintendent was the last word so far as the individual was concerned. They checked as to their education. So far as I know that has been the practice since then. I never heard of any conflict between the various religious groups in the use of the same room at the same time. If there was it never came to me and I doubt very much if it came to any member of the school board. I do not think any arrangement was made to avoid such conflict. I do not think it was ever brought up. We delegated that to the superintendent and it worked very smoothly. I am satisfied with what has been achieved as far as I know.

Q. The superintendent, both Mr. Nichol and Mr. Mellon, have been able to supervise this religious education in such a way that there was no conflict between the different denominations?

Mr. Peterson: Objection, there is no evidence that he supervised.

The Court: Sustained.

The Witness (Continuing): The public schools in the city of Champaign are under Mr. Mellon's supervision. He is superintendent of schools. He knows of the method of business that the school board does. Of course the school board as a group handles the schools. Individually we do not carry any power, we do collectively. With reference to the supervising religious education and secular education for the purpose of avoiding conflict in the use of the schools, the superintendent works with the principals of the schools [fol. 166] and I think it has worked smoothly. Nothing has ever come to the school board.

Rev. H. Clifford Northcott, called as a witness on behalf of relator, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is H. Clifford Northcott. I am minister of the First Methodist Church of Champaign, Illinois. I reside at 409 W. Hill Street, Champaign. I am acquainted with the teaching of religious education in the public schools of Champaign. I came to Champaign seventeen years ago. I found an interest in weekday religious education among the congregation, and as the interest grew we found a group of ministers and others likewise interested. They gathered together at a mass meeting in Wesley Foundation about five years ago. People from all faiths were invited to come. Many did come. Wesley Foundation is in Urbana. It was a convenient meeting place and it was hoped that the effort would be a twin-city effort. There was a great interest in it. The school superintendent became interested and others. Committees were formed and plans studied. A committee was appointed and went to the school board and cooperated

with the school board in further promotion. The superintendent of schools cooperated with them very willingly. He told us that he had looked into this matter of religious education, that it held a position of common interest, it was part of an educational interest that he had—all such matters were considered. I think he allowed us to come to the board meeting to present our statement. He did not ar- [fol. 167] range with us then for the use of some school buildings. He did not make arrangements with us with reference to teachers but we had the inference he would. We did not employ any teachers until the matter was approved. The school board gave its approval for the use of the buildings. There are all kinds of things held in the school buildings, and those matters are handled by the superintendent of schools, and this was just another type of things that was handled along with his other work. We had a committee of teachers. The first one selected was Mrs. Peter Auten. She was employed by the council of religious education formed in the community. The council consisted of all who would enter. I cannot tell you all who entered. There were the Methodists, Presbyterians, Episcopalians, Disciples of Christ, Baptists, Congregationalists; I think some Four-Square Gospel people. I have seen the tabulation. It was a great list. I mean representatives of those faiths. There would be a couple probably from each church. I don't remember if Universalists came. We do not have a Universalist church in Champaign. I did not notice any Jehovah's Witnesses. I believe the Methodists had 8 representatives, the Presbyterians had 4, the Congregationalists 3, the Baptists 2, the Christians had something like 4, that is not accurate.

This council was kind of hard at first to get started. We got together as good democratic organizations do. We formed with a president, a vice-president, a secretary and treasurer. Then we appointed our committees. There was no constitution at once but it was gained after a while. By it we set forth the statement of principles and purpose of the organization. We did not then raise any money with which to conduct religious education. The money was provided among the ministers. We thought we ought to get [fol. 168] contributions from the various churches in proportion to their ability to contribute to the general cause. There was a voluntary response. No assessments were

made. When the money was gathered and we had sufficient funds we employed a teacher. The council paid the teachers. The committee selected the teacher, who was then approved by the council. The council did not purport to be a public body of any kind but it was a public body in the sense it was democratically selected in the community. Then the superintendent was informed about the teacher and her qualifications. I think the superintendent felt happy. He approved that teacher. I think her name was submitted to him by the teacher's committee in his office where he regularly does business. I think the council talked over with the superintendent the arrangements for the class rooms for the teachers and they thought that things could be arranged and after they knew the extra time and furniture, what was absolutely necessary to be used by these teachers, they arranged that. They left that to the superintendent and the teachers to arrange, just as they would for any other detail or any other meeting in the schools. I had nothing to do with reference to children whose parents might not approve. I never heard of any parents objecting to the courses for any reason, except possibly that the schedule was crowded. I have never heard of any complaints. With reference to obtaining the opinion of the parents as to whether their children ought to take these courses, the parent has to sign a card to permit the child to attend these classes. I do not know how the parents get those cards. I saw the cards and I had a child that took the course. Marian Louise Northcott brought it to me. I do not know where she got it. I signed it and she took it back.

[fol. 169] EDWIN H. REEDER, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Edwin H. Reeder, 716 Iowa Street, Urbana, Illinois. I am a university teacher. I am affiliated with the Urbana Society of Friends, commonly called Quakers. I have talked with Mr. Franklin about this case on the telephone Saturday afternoon. I did not know him until I saw him here, and one of the ministers gave me his name.

I am familiar with the teachings and tenets of the Friends. I am not an expert on it. I am familiar with their doctrines. There are no articles of faith in the Friends. The doctrine is that one's own conscience instructed by the Bible is his only guide. There is no creed. I presume that the Quakers teach their beliefs to the children. I have never been a member of a congregation that had a church school. There are as many beliefs with reference to Jesus Christ and his divinity as there are Quakers. There are wide differences, two main groups. One group accepts the divinity of Jesus in the same way it has been discussed here today, that is, actual divinity in the sense of Jesus being God. And the other, in the sense that He was divine in the same sense as every human being is divine, not an actual God.

I know of no tenet accepted by all Quakers with reference to resurrection of the body after death. The Quakers in general accept the belief in God. I do not know the nature of it, the meaning of the term "God" since it is not covered by creed or theory of the Quakers. They would have different beliefs.

[fol. 170] Rev. Ernest William Moore, called as a witness on behalf of relator, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Ernest William Moore, 604 East Clark Street, Champaign. I am a minister of the gospel and a printer. I am affiliated with the Interdenominational religious group. We have the Twin Cities Bible Church Interdenominational, to that extent it is an organization. I am familiar with the teachings and doctrines of the Twin City Bible Church. Their doctrines with reference to the divinity of Christ are absolute. He was God and man. These doctrines include that Jesus was crucified, died and came to life again in the body. The doctrines teach that all human bodies which die are resurrected again; that Adam and Eve were the first man and woman; that they were the ancestors of all people. They teach that the Bible is absolute perfection as a source of science, religion and history.

Cross-examination.

By Mr. Franklin:

I do not object to the religious education classes being conducted in the public schools in the manner in which they are conducted, on released time. I have no denominational objection to urge on behalf of my denomination.

[fol. 171] Bessie Taylor, called as a witness on behalf of relator, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Bessie Taylor, 206 North New, Champaign. I am a teacher in the Champaign elementary schools. This is my fourth year. I teach in the Dr. Howard School. I taught there last year, fifth grade. There are two fifth grade classes there. I have fifth grade again this year. I use one room for teaching. I use the same room all day. At different times the music supervisor and art supervisor teach in my room, and the religious education teacher. When the art supervisor comes in I turn the pupils over to her. She teaches a lesson in art. While she is teaching I observe. I do the same thing when the music supervisor comes in. At times I do the same thing when the religious education teacher comes in, not all the time. When I do not observe I may supervise the children that are not taking religious education. During the past year I have had children who did not take religious education, 2 the first semester and 1 the second. The first semester they were Elwin Miller and James McCollum. When religious education was being taught we went to the music room. They took material they needed to work, maybe recreational reading or something like that. In the second semester James McCollum did not take it. He did not take it any time during the last semester. When the religious education was being taught in my room during the last semester he went into the music room with work he needed to do, a part of the time. One day he sat out in the corridor.

Religious education was taught in my class Friday between 10 and 10:30 last year. That is my best recollection.

[fol. 172] Terry McCollum left the room on days when religious education was being taught at the beginning of the period and came back at the end of the period. We did not have a recess or intermission between the time I stopped teaching and Miss Chapin began; there is always a little intermission between classes. I suppose it was about 5 minutes, perhaps ten. The children did not leave the room during that 5 or 10 minute period. It was at that time that Terry McCollum would leave the class room. After Miss Chapin had finished her class there was a corresponding little period. At that time Terry would come back in. Part of the time I observed religious education lessons. To a certain extent I observed what was being taught. I sat at my desk, as a rule. I did not try to instruct the pupils while Miss Chapin was teaching in the class room. The children occupied the same seats. She used the blackboard at times. The building was heated during that period in the winter while she was teaching. She did not bring a janitor with her.

The children who were to take religious education brought cards from their parents, signed by them, giving permission. I could tell from them which students were to take religious education. I saw them when they were brought back to school from the parents. The cards first came to me and I passed them on to the religious education teacher. I distributed the cards among the pupils when they first came in. They were left on my desk. Then the pupils brought the cards back to me after they signed them and I passed them on to the religious education teacher. I distributed them and I collected them, that is all. That was usually just before dismissal, at the end of the work day, and they were brought back to me in the morning.

[fol. 173] I was not required to teach an extra half hour in any week on account of the religious education. I was not required to spend more hours in the school room on the day Miss Chapin came in than any other day.

Cross-examination.

By Mr. Franklin:

The school day starts at 9 o'clock. I get there at 8:30. As a rule I leave at 4:30. I would say the other teachers make it a practice to be there at 8:30. I do not teach until 4:30. The building is heated when I get there in the morn-

ing. During the season when heating artificially is required normally it is kept up to a comfortable, proper temperature until 4:30 in the afternoon. Artificial light is used during the daytime only when needed. The room has windows in it. They all do. They are arranged so that the light falls over the left shoulders of the children. That is proper practice according to good educational opinion. We make use of daylight as much as possible in the class rooms. Artificial lights in the chool room are used only occasionally when it is a cloudy day. So far as I have observed they generally manage the religious education classes without using artificial light, the same as any other teacher would. We use it when we feel it would be injurious to the children's eyes to try to work at their desks without extra light.

As a rule janitors would come to the room once if we have lunch pupils or anything extra; they come in at noon and take care of everything that needs to be taken care of. It is customary to clean up the room once at the end of the day. The religious education classes did not add any janitor work in the Dr. Howard School.

[fol. 174] Redirect-examination.

By Mr. Chapman:

We have to turn the lights on on dark days. Miss Chapin used them on dark days the same as I did.

Q. Did you notice anything unusual with regard to Terry McCollum, any discomfort about him when he left the room and when he came back again?

Mr. Franklin: I object to that.

The Court: She may answer.

The Witness (Continuing): I felt that he wanted to stay in the room very badly. He showed an interest in the religious education class, he did not seem to want to leave. He wanted to see every move that was going on in the room, to see what they were doing. I do not recall that he every stayed in through the class. I do not remember if he ever stayed in the class and participated. I do not recall that he ever inquired of me about this religious education class.

He was poor in his work when he came to my class. I made some effort throughout the entire year to have him

catch up with it. I never talked with him with reference to the probability that he might be able to take this religious education course if he would get caught up with his work. I talked to his mother, never to him. I discussed with her the fact that allowing him to take the religious education course might help him to become a member of the group. He was not accepted as a member of our class. I thought if he did the same things that they were doing that might help. He did not take it.

The course that was taught there seemed to interest the children very much. They seem to like Miss Chapin. Her classes were not any more entertaining than any other class in school. They were interesting.

[fol. 175] Recross-examination.

By Mr. Franklin:

I observed him when he first came to my school in the fall of last year. He was a new student in that class. He never seemed to be accepted by the other youngsters from the beginning. I do not recall if it was from the very first day. It is usually pretty informal at that time but I would say yes. The religious education classes never start the first week. I do not know the reason. I do not know how soon after. Even before the religious education classes started it was apparent that James did not fit into the group in that school. He never did get assimilated into that class. He came to me with a history from his mother of not being able ever to get along with other children. I never observed anything about him or his relations with other children, or what they may have said at any time which would have indicated that the presence of religious education classes had anything whatever to do with his non-acceptance by the group. No child ever said to me or in my presence anything to indicate that his attitude toward James was affected in any way by any religious differences between them. I never heard James' non-belief in God mentioned in my school room or about the school premises or anywhere by any person. It was a matter of concern to me that James' attitude toward other children and their attitude toward him became worse as the year grew on. I made an investigation to get at the bottom of this thing and to help them. The children did

not seem to like him from the very first. He was a stranger to them when he came into the room. When they would get into trouble I would ask the other children what was the cause, and they would say James had called them names, James had kicked them and punched them and he spit in [fol. 176] their faces. That accusation was made more than once, that he spit in other children's faces and they just would not take it. None of these children ever said that they did not like him because he or his parents did not believe in the Almighty God or anything of that sort. It was not any religious matter. No religious matter was ever discussed.

The other youngster who did not take the course the first half of last year was Elwin Miller. He was a stranger in the class then. He had just transferred from the Lincoln School. He did not take the religious course during the first half of last year. The children accepted him from the beginning. He was liked and included in their games, in everything they have. He was treated exactly the same as James was so far as religious education courses were concerned. I do not believe that James' non-participation in the religious course or the existence of those courses in the school had anything whatever to do with his non-acceptance by his classmates. I do not think it subjected him to any embarrassment of any sort at any time.

Redirect-examination.

By Mr. Chapman:

Q. When you suggested to James' mother that if he would take the religious education course it might help him to become more acceptable to other students what did you have in mind at that time?

Mr. Franklin: We object to cross-examination of this witness by Mr. Chapman.

The Court: I will allow her to answer.

The Witness (Continuing): I made that suggestion just as I made the suggestion that he become a member of the Boy Scouts Troop in our school. I thought it might help [fol. 177] if he would be in the group and worked with them all the time, it might help him.

The other boy joined in with the group during the second semester.

SARAH GRACE JORGENSEN, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Sarah Grace Jorgensen, 507 South Highland, Champaign, Illinois. I am a part time teacher in the religious education course in the public schools of Champaign. Last year I taught in the Lawhead, Marquette, Wolfe, Switzer, Gregory and Junior High. These are public schools in Champaign. I teach under the supervision of Miss Mae Chapin. I teach 30 minutes in the grade schools for each class and 50 minutes in Junior High School. When I appeared in the grade schools, in two of the schools, the class and I went out of the room; in two or three of the schools we went out of the room; and in other classes, the teacher stayed in because nearly all of the children took the education, in fact all of them did. In the Marquette, the children went out of the room with the teacher. I taught in classes where nearly all the children took the religious education course. That was the Frances Willard School. There were only 3 class rooms in that school, the 4th, the 5th and 6th grades. There were other class rooms in that building. I taught religious education only in those 3 grades.

I followed the same outline that Miss Chapin follows. I heard her testimony yesterday. I teach substantially the same things that she says she taught. I teach the children [fol. 178] that the earth was created by God. All I say that it was in the beginning. I teach that man and woman was created on the last day; that their names were Adam and Eve. I do not explain to the children that the story of Adam and Eve may not be true, nor that Adam and Eve may not have been the first man and woman. In talking to the children, I try to use language that they can understand. I do not try to explain the word "God."

Q. I am asking what you mean when you use the word "God".

Mr. Franklin: We object. It does not matter what this lady means by a term. What she says to the children is an important issue.

The Court: Objection overruled.

A. I simply use the word "God" as it has always been used. The children come to school with that "God." Therefore, I do not explain it. God is a person.

Mr. Chapman: I move that the answer be stricken.

The Court: I am going to permit him to ask you, inasmuch as you said you taught, what in your mind you mean by "God" as near as you can explain that.

A. A Supreme Being in whom I am willing to worship.

Q. Do you mean a man with supreme powers?

Mr. Franklin: Objection. She has not said anything of the kind.

The Court: Sustained.

The Witness (Continuing): It is something outside of ourselves, something higher to which we can appeal; and I think that is the idea that the children get; some person or something else which stands ready to help them or something we can go to.

[fol. 179] Mr. Franklin: I move to strike the last answer as to what she believes the children understand about God.

The Court: That part will be stricken. What she believed the children understood, is a matter of conjecture.

Q. Do you mean by a "Supreme Being" that God is something to which a man or woman may appeal and say prayers?

Mr. Franklin: Objection. It is cross-examination of his own witness and it has been asked and answered twice.

The Court: She may answer.

A. Yes.

Q. Do you mean that it is a being or thing which governs man and woman?

Mr. Franklin: Objection.

Mr. Peterson: The Supreme Court of the United States has said that we believe in God in these United States.

The Court: It has been answered, but I will let her answer this.

A. I might say this with qualifications.

Mr. Franklin: I move to strike that answer.

The Court: Let it stand.

The Witness (Continuing:) I am not able to go into that any further.

Q. Do you teach any relationship between God and Man? Is there any connection between the two? Is God able to help you in any way or able to help children or are they able to exercise any influence over him by praying to him or appealing to his decisions or anything of that kind?

Mr. Peterson: I object to that as multiple.

[fol. 180] The Court: Objection sustained, and on the ground it has already been covered.

This court will take notice that the answer to that question would be yes.

Mr. Chapman: I offer to prove that she teaches the children faith and obedience to God.

The Court: You did not ask her that question.

Q. Did you teach the children obedience to God?

Mr. Franklin: Objection. There is no evidence upon which to base that cross-examination, if he is entitled to cross-examination. This witness has not refused to answer any of his questions. There is no reason to call her hostile.

Mr. Chapman: Her very position makes her a hostile witness, the fact that her employment would be abolished by this law suit.

The Court: Objection sustained until it has been demonstrated she is withholding information.

The Witness (Continuing:) I taught that the children are to obey God, the good which God stands for or the Supreme Being. I do teach obedience to God. With reference to possible reward or punishment, I say it is his own conscience that is there to take care of him. If he is doing the thing that is right, his conscience will say so. That means that God is satisfied. That is the way it seems to me, that God is part of your conscience. I would say that I teach that if they do not obey God, punishment will follow. It is like putting your hand on a stove, you will be burned. I teach that the punishment will be in the natural course of events. I teach that God will have something to do with punishing them if they sin. I have never mentioned Satan. I do not mention Hell when I teach religion. I do mention Heaven. I mention reward for obedience to God. I teach [fol. 181] that the child is rewarded through God. If he is doing some certain thing that is good, he is rewarded in that he is given a bigger opportunity to do something greater. I teach that God is giving them a reward, that

anything may be withheld because they have not done certain things. I try to teach them on the positive side, not the negative. The only book they can use to find out what God wants is the Bible.

I teach them with the Bible and also with cards. I say that the word, the Bible was written because of certain people who had the power to do it, and God's hand was in the power to do it. Studying the Bible to try to get out what was written is one of the things we have worked on.

I teach with reference to Jesus Christ. I teach the Christian religion. I do not distinguish between it and any other denomination when I teach Christian religion. I explain that there are other denominations. By "Christian religion" I mean pertaining to the Christ action, toward being Christianlike, something that would be like Christ would be. I teach that the Christian religion includes a belief in Jesus Christ. A Christian is a person who believes in Christ, but you may do Christianlike acts and not be a Christian.

Q. His religion would not be different from any other religion?

Mr. Peterson: Objection as being argumentative.

The Court: Sustained.

The Witness (Continuing:) I do not call all good acts Christian, but they are good acts and would be done by a person who did as Christ would want them to do. I teach that there was a man called "Jesus Christ;" that he lived [fol. 182] with flesh and blood, that God was his father, that a woman named "Mary" was his mother; that he had some unusual traits or powers, that he performed some miracles, that he healed sick people. That he raised dead people and caused them to live. I do not teach that such powers could be or can be acquired by other persons, but he left that power to some of the people when he left the earth. I do not teach that he left it to all people. All the people were not capable of taking it.

I do not teach anything with reference to his baptism. We say Christ was baptised and that is all we ever say about it. When I speak to the children, using the word "baptised," I mean using water. I do not know how Christ was baptised; maybe he was put into the water and maybe he was not. The only thing taught about it or mentioned is that Christ was baptised by John the Baptist in the River Jor-

dan. I can't remember a single instance of the children asking me what I mean by "baptised." They had the pictures, etc., and saw John the Baptist and Christ.

I believe we are taught from the Bible that people live after they die. I do not teach everlasting life. We have certain outlines to follow and I do not talk about everlasting life. I do not believe that I teach them anything with reference to people living again after they had died. I teach them that Jesus lived after he died once, that he rose on Easter Sunday, 3 days after he died. I taught that afterwards he was seen by certain disciples, afterwards ascended to Heaven to the sky and disappeared from the earth. I think I just said that he rose after he had been with the disciples a certain number of times and we believed that he ascended into Heaven. The children understand Heaven as the sky, going up into a place higher than the earth; [fol. 183] the sky, that is the blue covering over our heads. I do not teach anything more as to what became of him after he came up into the skies.

With reference to children being able to come in contact with him after he had gone up into the sky, we have the prayer where he says in Jesus's name, asking a prayer that he do it for Jesus's sake. We do not teach that Jesus is within hearing distance of them when they say prayers, we assume that they have that.

Mr. Peterson: I object, and move to strike. She says that she does not teach those things. The rest of the answer is her opinion and conclusion.

The Court: Let the answer stand.

The Witness (Continuing:) I do not teach them prayers except the Lord's Prayer. I teach that Jesus has all influence over their lives. I do not go any further to teach them how Jesus exercises any influence over them now. I do not tell them how he can do that. I do not teach them anything else with reference to their relationship with Jesus. We tell stories so they get the idea of faith. As an illustration, I could tell of when Moses was taking his people across the Red Sea, how they went across on dry land. I tell them that they had faith that God would take them through.

I teach the Christian religion of Christ's time. I do not endeavor to give the religious views of people who live today.

Cross-examination.

By Mr. Franklin:

In teaching of the creation of the world and of Adam and Eve, I teach that as what the Bible itself says regarding them. I do not urge it upon the children as my personal beliefs, I read it from the Bible and they take their interpretation. When I teach the story of Moses and the people [fol. 184] crossing the River Jordan, I read the story from the Bible or from the story book taken from the Bible. That is what I mean when I said I tell the story to the children. I do not urge it upon the children as a matter of my own personal belief or that they adopt it as their own belief.

I have never taught any Mohammedan children in my class or any who believe in the Zoroastrian Zend-Avesta. I have none who believe in that form of scripture or any who believe in the Hindu Veda. None in my charge believe in Allah or Ormuzd or Brahma. I have none who are confessed Atheists that I know of.

Q. Have you ever practiced proselyting upon any atheist child or upon any of the believers in religious faiths which I have mentioned?

Mr. Chapman: Objection.

The Court: Sustained, she said she had not any.

Q. Have you ever proselyted for any particular religion?

Mr. Chapman. Objection. That calls for a conclusion.

Mr. Franklin: It is a conclusion in their own pleading.

The Court: Objection sustained.

The Witness (Continuing:) I have never attempted by word or act to change the belief of any child from one form of religion to another. I have some children in my classes who are Lutherans but I do not know whether they belong to St. John's Church. I have never had any Quaker children. No child in my classes has ever expressed to me a feeling or belief that I was attempting to teach them something contrary to their conscience or their own religious belief or that of their parents. We never mention the different religions. We steer away from certain things that would [fol. 185] not include them all. Religious tolerance is one of the objectives of the courses. In referring to that we probably take in the ethical teachings of the Bible, or the

Bible content; we get at it from the ethical standpoint; that the children are going to work and play together, and then as we go on develop it into the best citizens it is possible for them to be; that they are to be tolerant sympathetic, kind and honest. We teach them to respect other persons' religious beliefs, that is what tolerance would be. I at no time attempt to place my own personal interpretation upon the subject matter of the Bible. I do not attempt to place any doctrinal interpretation upon the Bible consistent with my own belief or that of my own church denomination. We do not speak of churches or denominations. I do not attempt to teach the doctrine of my own denomination in these courses. I am affiliated with the Christian church. I also work in the Methodist Church and I taught at the Presbyterian. I am married to a Lutheran.

Redirect examination.

By Mr. Chapman:

I know a little about the doctrines and teachings of the Methodist Church, a little about the doctrines and teachings of the Presbyterian Church and very little about the Lutheran. I know a little more about the doctrines and teachings of my own church, the Christian Church. I am familiar with the doctrines and teachings of churches with which I have had connections. I am not familiar with those churches with which I have not had any connections.

I do not interpret the scriptures in any way. There are some things that we all interpret, that we interpret with all the other churches that I know of. The churches that I do [fol. 186] not know would certainly have the same principles, at least the Gospel, etc.

Q. With reference to your teaching about Jesus, what about these things you people do not teach to the children?

Mr. Franklin: She has twice stated that she does not place any interpretation upon Biblical material. He is now assuming that she does interpret. I object.

The Court: Sustained.

The Witness (Continuing): I do not teach anything I do not believe myself. I do not believe every doctrine that was taught by every church that I know of. With reference to our teaching with respect to the religious beliefs of others, we teach that it is their religion and therefore

whatever they believe, if they act according to it, they are going to be good people, no matter what church or where they belong.

Q. Do you mention anything in discussing tolerance, with reference to present day religious persecution, with Jehovah's Witnesses, for instance; with reference to their being sent to jail for refusal to enlist in the army or for being conscientious objectors, or to being arrested for refusing to apply for licenses?

Mr. Franklin: I object.
Mr. Peterson: I object.

A. No.

The Court: Objection sustained.

Q. Are you familiar with present day religious persecution?

Mssrs. Peterson and Franklin: Objection.
The Court: Sustained.
The Witness (Continuing): To qualify myself to teach religion, I have had college work, normal work, I have taught in public schools and I taught in the Junior High [fol. 187] schools. I did not teach religion up until this last year.

Q. Have you made any study of present day religious persecution?

Messrs. Franklin and Peterson: Objection.
The Court: Sustained.
The Witness (Continuing): To prepare myself to teach religious tolerance, I studied the Old Testament courses at the Hillel Foundation, a 2 hour course under Dr. Sachar and Rabbi Golden. I have not taken any special work as far as Christian religion is concerned. That is the extent of my study in preparation for teaching religious tolerance.

Q. Do you teach religious tolerance as including anything with reference to anti-semitism?
A. We teach tolerance for every other person, regardless of his religion, whether he has a religion or not, it makes no difference.

Mr. Chapman: I ask the answer be stricken.
The Court: I will let it stand for the present.

The Witness (Continuing): We teach a great deal of tolerance for the Jews. That is what our religious basis is built on, on Jewish history. That is what we teach in the first year, the 4th grade. That is our history, that is where we get our stories. We do not just teach tolerance—because we have so much respect for the Jews and their Jewish religion. We get the story from the Old Testament. We do not get any from the year 1944 to 1945.

As far as I know, not a child in the class signed a card showing a belief in Allah. Each person who signs the card indicates what his religious affiliation is.

[fol. 188] Recross examination.

By Mr. Franklin:

If they have no particular religious affiliation, they say so or else do not sign the card. What we seek to learn there is if the child has some formal affiliation with some church. Those are the cards their parents sign if they request that they be admitted to the Protestant Religious Education classes. I attended Western Normal School for 2 years. Then I came to the University of Illinois for 2 more years and received a bachelor degree. After 2 more years of attendance, I received a Master's Degree in psychology. I have about 2 units at the University on a doctor's degree. I have normal education in religion at Hillel Foundation, that is Jewish.

Q. What is your own personal attitude with reference to tolerance of Jews?

Mr. Chapman: I object as to her attitude.

Mr. Franklin: She has testified that she teaches religious tolerance. I have a right to find out whether she really believes or whether she is just begging the question.

The Court: Objection sustained.

The Witness (Continuing): I guess that my study in the field of psychology did have an effect upon my attitude or tolerance toward other people and their beliefs. It made one broader, stretched the imagination to take in these other fields. I am able to do that freely and wholeheartedly. In the field of public education, I taught 6 years in McCook, Ill., the primary grade. I took training at a class in kindergarten, then I came to the Champaign schools

in 1909 and taught to 1930 with the exception of 2 years. I started in the primary grade; then took charge of the supervision, then went into the Junior High School.

[fol. 189] Q. Do you believe that religious education courses as taught in the public school buildings of School District No. 71 are beneficial to the students therein enrolled?

Mr. Chapman: Objection.

The Court: Sustained as beyond the purview of cross-examination.

Q. Do you believe the courses in religious education by the Champaign Council of Religious Education are of educational value to the children enrolled therein?

Mr. Chapman: Objection.

The Court: Sustained.

Redirect examination.

By Mr. Chapman:

Q. In this formal study or preparation qualifying yourself for additional work, have you studied the matter of religious persecution?

Mr. Peterson: I object to the characterization of anything as "persecution".

The Court: We can take judicial notice; if the witness understands she may answer.

Mr. Chapman: She said she teaches religious tolerance and testified as to her qualifications.

Mr. Franklin: I am opposing Mr. Chapman's having the privilege of cross-examining his witness.

The Court: The objection will be sustained.

RETA CAMPBELL, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Reta Campbell, 610 W. Healey, Champaign. I am a teacher at the Colonel Wolfe School, teaching fifth grade. There is one fifth grade class there. I have taught

[fol. 190] there six years. Mrs. Jorgensen taught religious education last year. She did not teach in my class room. She taught some of the members of my class, about half. The course was given in a room across the hall that was not being used. It has seats in its like the other rooms. At times it is used for music. It is not used for art; we have art in our own room. That room was used only for music and religious education last year. Religious education was taught to fifth graders from 9:30 until 10 in the morning. I start instruction at 9 o'clock. At 9:30 I sent my children to her. She came there to teach once a week for half an hour. The other students stayed in my room during that time, doing things that were interesting to them. The children who attended class in religious education were not given any extra work to do by me.

Q. So that when they took religious education they simply dropped out a half hour?

Mr. Franklin: I object to that as a conclusion.
The Court: Sustained.

Q. This half hour was a half hour deducted from their every day training?

Mr. Peterson: Objection.
The Court: I think the question improper as calling for a conclusion.
The Witness (Continuing): I began classes at 9 o'clock in the morning and stopped for lunch at about a quarter of 12, resuming teaching at 1:15 in the afternoon and going until about ten minutes to 4, last year. Religious education class was held on Wednesday. I did not spend any more hours on Monday or Tuesday than any other day. School hours are the same every day throughout the week. [fol. 191] I did not determine which students to send into Mrs. Jorgensen's class, the ones who wanted to go went. They were excused from my room. They decided for themselves. We had notes from the parents which were brought to me by the child. I do not remember whether I gave those notes to the principal, I suppose they went to the principal.

Mr. Franklin: We move to strike what she supposes.
The Court: It will be stricken.
The Witness (Continuing): The notes from the parents were kept together and given to the persons who would be

supposed to have them; it must have been the principal. I am not sure about that, whether the principal or Mrs. Jorgensen, one or the other. I would give the children blanks to be taken home for the parents to fill out. When I excused the children to take religious education classes I saw them go to that class. I did not excuse them to go out and play at the time. None of them left the building during the period they were excused for religious education. The rest of the children in my class stayed in the class room. They did not have my permission to leave the building during that period.

WILLIAM C. BURSK, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is William C. Bursk, Tilden-Hall Hotel, Champaign. I am a Christian Scientist practitioner and am quite familiar with the teachings and belief of the Christian Science church.

Q. Tell us the meaning of the word "God" as it is used [fol. 192] by the Christian Scientists.

A. If you will give me that book I will tell you exactly what it means.

Mr. Peterson: Objection as immaterial to the issue.

The Court: I will let him answer.

Mr. Franklin: There is nothing in the record in this case to indicate that any Christian Science child participates in these classes.

The Court: There may be some children with Christian Science parents in the schools here.

The Witness (Continuing): The definition of "God" according to the text book is: "The great I am; the all-knowing, all-seeing, all-acting, all-wise, all-loving and eternal: Principle: mind, soul, spirit, life, truth, love, all substance, intelligence." I am referring to the text book on Christian Science, "Science and Health with key to the Scriptures," by Mary Baker Eddy. According to the teachings, the doctrine of Christian Science, Jesus was a human man, Christ was the divine idea, the spiritual man.

The name was generally used, Christ Jesus or Jesus the Christ, or Jesus Christ was the same. It was given in the Bible as such. They were all the same, with the exception that Jesus was the human man and Christ was the spiritual man or spiritual idea.

We take the Bible entirely as our guide with reference to the resurrection of Jesus; our teaching is that Jesus is the highest human corporeal concept of the divine idea. Jesus was the human man and Christ was the divine idea. We take the inspired word of the Bible as our all-sufficient guide to eternal life. We acknowledge Jesus as the attainment of the evidence of divine foundation of life. He was the only man who returned after what was supposed to be death. He was the spiritualization of thought, the new higher idea of immortality or spiritual existence. We ac- [fol. 193] knowledge him as the savior of mankind. We acknowledge him through God in healing the sick.

We teach that he was crucified and appeared back in life to the disciples after three days in the tomb, according to the record in the scriptures. I do not believe that all people die and come back to life again as mere creatures. I do not know what the others believe regarding that. I am generally familiar with the teachings of Christian Science with reference to resurrection. The human man does not come back to life again after he dies.

I cannot answer definitely what the Christian Scientist teaching is with reference to baptism. I am not generally familiar with that doctrine. The definition given here of baptism is: "Purification by spirit submergence in spirit," as taken from II Corinthians, Chapter 5, Verse 8. We do not teach baptism as immersion in water or sprinkling of water. We do not think that Adam and Eve were the first man and woman.

Cross-examination.

By Mr. Peterson:

The Christian Scientists use the same Bible that contains the story of John the Baptist and his baptism of Christ that has the story in it about the creation of man. They use the so-called King James version of the Bible. They believe in tolerance toward other religious faiths. We believe that everyone should have the benefit of the studies and explanations of other known religions that are practiced in the

community; that children should have the same opportunity to study the Bible if they so desire as an adult. I cannot answer whether the Christian Science church has any objection to the voluntary religious education system as conducted in some schools.

[fol. 194] Rev. Clarence J. Higgins, called as a witness on behalf of relator, being duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Clarence J. Higgins, 409 W. Clarke Street, Champaign. I am pastor of Holy Cross Catholic church, Champaign. I have been in this occupation 31 years and pastor in this church 6 years. I am familiar with the religious education classes taught in the Champaign public schools. About five years ago I was a member of the committee that arranged for that. Time is set aside for teaching children of Catholic parents. My assistant or I teach them. In some schools we have no children in attendance.

Last year we were in three schools, Junior High, South Side and Columbia. At South Side we taught fourth, fifth and sixth grades. They were combined. There were only five out of the three grades. They were all instructed at one time. A room in the basement was provided, I presume by the principal. Miss Chapin made the arrangements for us. I do not know if the room in the basement was used for anything else. It could be used for other things. It was furnished with chairs and I believe a table. I presume they were furnished by the school authorities. They were not furnished by me, the Catholic church or the religious council.

At Columbia School there were between three and five students. We had the same arrangement there. There we had a small room, the music room. One class a week was taught there on Friday afternoon from 3:20 to 3:50. The building was occupied by other students at the time. At [fol. 195] South Side the class was Thursday afternoon at 1:15. It ran thirty minutes. The building was used by other pupils during that time.

At Junior High we had ten or twelve pupils. They were taught Friday afternoon at 2:25. Ordinarily my assistant

went to Junior High and I went to Columbia. At Junior High a room was provided, a class room furnished with desks, table and blackboard. I do not know whether it was ever used for anything else, but I took for granted that it was. The class ran approximately thirty minutes.

The teaching was religious, in conformity with the Catholic faith. There were only Catholics present.

Cross-examination.

By Mr. Franklin:

I believe in religious toleration, it is a part of the Catholic teaching that I teach in my religious education classes. We teach love of God and love of neighbor which necessarily contains tolerance, and also specific tolerance. I believe that it has the effect of broadening religious tolerance of children who are enrolled in my classes.

Mr. Chapman: Objection, and I move to strike the reference to what he believes.

The Court: Objection sustained as not being cross-examination.

Mr. Franklin: When you put a witness on the stand and open up the subject of what he teaches we have a right to inquire whether it includes religious tolerance and whether or not it affects the children's attitude with reference to religion.

The Court: You have been permitted to show the teaching of tolerance. The rest is beyond the purview of this examination.

[fol. 196] Q. What has been the effect on the community generally with reference to religious tolerance since these courses have been instituted by the Champaign Council of Religious Education.

Mr. Chapman: Objection.

The Court: Sustained, as beyond the scope of the direct examination.

WANDA I. BASH, an intervenor, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Wanda I. Bash, 512 South Highland, Champaign. I am thirteen years old and attend Champaign Junior High School. I am in the ninth grade.

Religious education was taught in the Junior High school last year. I took the course. Miss Chapin was my teacher. My regular school teacher was Miss Green. We have a different teacher for every class. The first period was my home period, 15 minutes, beginning 8:35 A. M.; the rest of the periods were 45 minutes long. Lunch was from 12:30 until 1:15. I was through at 3.09. There were nine 45-minute periods and a 15-minute first period. That was my regular routine from Monday morning until Friday afternoon. I am not sure, but I believe that the religious education class was the ninth period on Monday. I took the course throughout the year. Miss Chapin taught the class in one of the adjoining class rooms. I was excused for the purpose of taking the class. I took it in place of a study period. I went there instead of to the study hall.

Last year I merely signed up for the class. We were [fol. 197] given a blank and signed up. I believe the blank was furnished by the office to the home room teacher, who was regularly employed in the school. I filled it out and returned it to her. My parents were not required to sign last year. I took the course for a 45-minute period. I am taking it again this year, having signed up for it. I am studying Christian Protestant religion. I do not want to study the Mohammedan religion or any other kind. I attend the University Place Christian Church. Last year when I took the course we used a regular class room on the first floor. Other classes were held in that same class room.

Mr. Chapman: I want to say I am calling her as an adverse party.

Cross-examination.

By Mr. Peterson:

This is the fourth year I am taking these courses. The first year my parents signed a card. After that I signed up. My parents have known about it each year. They approved of it. I want to take this course. In taking this course, devoting 45 minutes of my time to it, it did not in any way interfere with my regular work in school. I completed all of my studies. The pin I wear is the honor society pin. Twenty students out of each grade are chosen by balloting by the teachers and the students and by grades. Scholarship is involved. There are over 200 in the eight grades. Some of them do not take this particular course.

I have never felt any criticism of other children who did not take the course. No one ever coerced me to take the course. It has been of my own free will. I feel it has been beneficial to me.

[fol. 198] Redirect examination.

By Mr. Chapman:

Several of my friends did not take the course. They were Janet Wiseley, Mary Kent, Mary Lou Terry and Joan Herron. I do not know how it came to my attention that they were not taking it. I just knew they were not. They said they did not. Some were in my class. I asked them if they ever took it. Miss Chapin is the only one who ever taught me religious education. None of the other children ever said anything to me and others about taking the religious education course. We were given a schedule from the office of the principal of the school showing what room to go to for religious instruction. I do not know where the principal got the schedule.

I found this course was beneficial. I think it is interesting and that I have really learned something from it. It helps me get along with other people better. I think I found it easier to get along with people after I had the course in religious education. I mean I would get along better with all the people, not just the people that would take the course. I did not find that religious education helped fix the friendship with other people who were taking the course any more than with people who did not take it. I

would say it helped both those who did and those who did not take it.

Q. Did you observe that you had any more difficulty in getting along with the people who took the course than those that did not?

Mr. Franklin: I object.

The Court: She may answer.

The Witness (Continuing): I do not think so. I feel that it improves my friendship with everybody, with those who [fol. 199] did and those who did not take the course.

Recross-examination.

By Mr. Peterson:

I do not think I discussed with any of my girl friends the question of whether or not they were taking this course until after this lawsuit came up. We discussed it back around May just casually. That was while the course was being conducted. I do not remember any of the other people asking me if I was taking it. I also asked some of the others whether they were taking art and other subjects that were being offered. We discussed what we were going to take and what the hours were going to be, things like that.

Redirect examination.

By Mr. Chapman:

I don't remember if the Jewish people took it too. I don't know if the Catholic children took it. I think all my classmates in the religious education class were Christian Protestant.

Recross examination.

By Mr. Franklin:

The friends I spoke of, Janet Wiseley, Mary Lou Terry and others who did not take the course were friends of mine before the religious education class was offered. They are still my friends. The religious education classes and their failure to participate in them has not affected in any way my attitude toward them or theirs toward me.

Redirect examination.

By Mr. Chapman.

Q. Did you get any school credit for taking the course?
A. Yes, I did.

Mr. Franklin: Object, and move the answer be stricken, [fol. 200] there being no sufficient foundation and it being a conclusion.

The Court: The objection is sustained.

Q. You mean it was part of your schedule, don't you?
A. Yes, sir.
Q. Did you receive any credit in this religious education with reference to graduation?

Mr. Peterson: The same objection.

The Court: For the time being I will sustain the objection.

The Witness (Continuing): After I received my schedule and took the course I did not receive from the school any other credit or papers with reference to religious education. I received a nice book from my teacher in religious education as a reward. I received no credit on my regular report card. There was an extra report card for religious education bearing a grade. Mine was "A". I received no credit from anybody else. No mention was made of it on my regular report card. The report cards relating to religious education were distributed by the religious education teacher.

Rev. Alva R. Cartlidge, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Alva R. Cartlidge; 305 W. Hill Street, Champaign. I am a clergyman, pastor of the First Presbyterian Church in Champaign, and have been for over six years. I am familiar with the religious education system in the Champaign public schools. I was one of those who helped bring it about. I am a member of the committee that [fol. 201] *were* given supervision of some of the work in

connection with it. I am chairman of the personnel committee. The duties of the personnel committee are to select and approve teachers for the courses in the Protestant group. The other member of the committee is Mr. Bottomfield. We approve the teachers who teach the Protestant religion in the public schools. We have hired one new teacher this year, Mrs. Barry. We inquired about her qualifications in hiring her. We take into consideration the general education of the individual. We want someone who is on a par with the educational standard of the teachers of the school in which she teaches; the general personality and attitude of the person, so that we will have someone who will keep the harmony and will meet the approval also of the other groups participating in the courses. We want no one who will produce religious bigotry or religious hatred or animosity either in the children that they teach or any antipathy toward them or toward the other faiths that are participating. We do not want to have that kind of person in. That is what we take into consideration.

I do not recall inquiring into what church Miss Barry belongs to. I was not interested. I know that she is a Protestant. I know that Miss Chapin is Protestant because she is a member of my church. I have known her for six years. She has taught in the schools here approximately three years. It is only natural that one of the first things I found out about her was her church affiliations. Mrs. Jorgensen is Protestant. I have known her about two years. I first found out she was Protestant two years ago. We have not hired anybody but a Protestant to teach the Protestant religion.

[fol. 202] I have examined the outlines that are used in teaching the Protestant religion in the public school. The ones I have examined met with my approval. If they did not I think I would indicate to the teachers what I did not approve. The curriculum of the courses is in the hands of another committee. My duties once a teacher has been hired, are primarily to consult with the supervisor on the question of keeping the teaching staff in the schools. In these consultations I take into consideration the material brought by Miss Chapin, the supervisor.

The organization I belong to has contributed to developing the teaching of religion and religious education in the public schools. The council has raised funds and pays the Protestant teachers. The teachers receive no compensa-

tion from any other source for teaching religion in the public schools. I do not pay any money to Catholic teachers or Jewish teachers.

The organization has three elements, the Protestant, Catholic and Jewish groups. The over-all organization is known as The Council on Religious Education and has representatives on it of all of these groups. We ask the individual groups to send their representatives to this over-all organization, and they do. Under that there are three groups. We have a Protestant work committee, a Catholic work committee, and a Jewish work committee. Representatives of the various groups of each denomination or religious group are upon these committees. In the formal organization we have several committees. There is the curriculum committee, personnel and finance. On the curriculum committee are representatives of the Catholic, Protestant and Jewish denominations. On the personnel committee there are representatives. The Rabbi is out of town now; he has been transferred, but when the new Rabbi [fol. 203] comes we will have him upon that committee, so that it will be representative of the three faiths. The curriculum and finance committees are made up of representatives of the three faiths, considering the general problems of all. The purpose is to examine personnel and curriculum so that nothing prejudicial to any one of the groups or intolerance to any one of the groups shall be presented through personnel or curriculum. We check with one another on that basis.

The Protestant, Jewish and Catholic groups have their own curriculum committee, finance committee and personnel committee, so that in a way they can go along by themselves and still be checking through the over-all organization.

The over-all organization has representatives from the various denominations. It does not have representatives from all the denominations in Champaign. The members of the committee are not elected by public vote or secret ballot. Nor do all the voters in Champaign have the privilege of voting. In my church, the Presbyterian, we have representative system of government. We elect a session and a board of elders, which governs the local church. The session is empowered by constitution in all spiritual matters, and selects its representatives for the council by a vote at its meeting. The congregation elects the session, which

elects the representatives. I am appointed on the personnel committee by a vote of the representatives from the various bodies who make up the Council of Religious Education.

Cross-examination.

By Mr. Franklin:

The interest for the organization of this council originated from the whole community. At that time, approximately five years ago, there was quite a discussion in the [fol. 204] newspapers and in private circles of the problem of juvenile delinquency. There was such a problem in this community at that time. Youngsters were being taken into court and put into jail. At that time, in my opinion, the teachings in the religious groups of the community did tend to correct that evil. Approximately 60 per cent of the children of school age were reached in that way for approximately half an hour a week. The Champaign Council on Religious Education and meetings of religious leaders in other places discussed that problem. We did not feel that time was sufficient to meet the evil existing. We did not feel that these periods of religious education were accessible to a sufficiently large percentage of children of school age. This was a contributing influence to the inauguration of religious education classes such as are now conducted.

The council recommended that these classes be held in the school buildings if possible because of the convenience of the children and the safety, the distance the children would have to travel were the classes instituted in the church. Their safety was involved because we have several of the schools that are quite a distance from the churches. In the Champaign school district there are three schools over a mile from any church. If the children of the Dr. Howard school were taken to the nearest church they would have to cross a state highway and many main streets and side streets, upon all of which there is vehicular traffic. There was a problem of pedestrian safety in this community at that time in connection with automobiles.

The council felt that the moral and ethical conduct of people is dependent upon the religious belief of people, and set forth that American democracy can only be maintained by strong character, honesty, truthfulness, depend- [fol. 205] ability, and things such as that, and we believe

that through the forces of religion that might be strengthened and our democracy be helped. It was our aim in carrying forward these religious education classes to strengthen the character of the people, advance their honesty, fairness and dependability. It was not our aim to indoctrinate any child with the particular belief of any religion or religious faith or cult. Our attitude was that the particular doctrines of particular religious sects was our concern and not that of our council.

I stated that not all denominations or religious beliefs are represented in the council. All are free to participate and we are anxious to have them. No religious denomination or recognized church or belief has ever sought membership or participation in that council whose membership has not been freely accepted. All denominations that we knew about in the community were invited to participate. Letters were sent to all that we could find and personal calls were made. The St. John's Lutheran Church of the Missouri Synod, whose pastor is Reverend Kaiser, is welcome to participate and we would be delighted to have them. I do not know whether they are members as yet. I understand they have indicated their intention to join. The Jehovah's Witnesses are welcome to membership. There were no conditions, monetary or otherwise, placed upon participation in or membership in the Champaign Council on Religious Education.

I have not had occasion to voice any objection to anything found in the curriculum. I did not mean that I reserved the right to see that what was taught in these courses was what Presbyterians believed as distinct from some other religious denomination. It is not the purpose of the council to teach the doctrines of any particular church. [fol. 206] Rather it is the purpose to teach them the things in general which are common to the beliefs of all participating denominations. We do not attempt to teach only the things that are common to the Protestant, Catholic and Jew, but to teach such things as are common to all. Our policy is not to mention the differences upon which the religious denominations deviate. We consider tolerance of other persons' beliefs the objective of the whole program. In practice the effect of these courses upon the children participating therein has been a feeling of appreciation that others are participating in a religious movement. With that comes a sense of solidarity to and with society in par-

ticular and their juvenile group. I think that the children who have taken these courses are more willing to concede to others the right to differ from them on matters of religious belief than they were before they took the courses, because it puts all of the religious groups in an enterprise, in a cooperative enterprise, and because each group, irrespective of its size or financial strength or background is equal here in standing. I think the cause of religious cooperation among the different sects, beliefs and church denominations has been advanced in this community since these religious education classes have been started, emphatically. From my own personal experience in my contact with many Jewish and Catholic brethren I have found that we understand them much better, that I have made friends with them and we can talk in perfect harmony on a great many things of particular community interest. I attribute to these courses cooperation between the church denominations in other matters. After we had started this Council on Religious Education and met with the various groups we found, from a movement which had started from a ministerial association [fol. 207] encompassing the groups, that the laymen of the various groups were ready to cooperate in a new organization which is called the "Interchurchmen's Council" of Champaign and Urbana, which represents all faiths. They meet and cooperate. I think it is an expression of the general spirit of American democracy, religious tolerance, cooperation and understanding.

I was the first president of this council. During my term I found people who objected to religious education classes being conducted in the school buildings as they are. Mrs. McCollum called me on the telephone. No other person objected.

In setting up this system here we modeled it after the movement that has been taking place throughout the country. There were religious education classes in 46 states, according to the International Council on Religious Education, in well over 1,000 school systems.

Redirect examination.

By Mr. Chapman:

The "Interchurchmen's Council", in which laymen cooperate, is the only council of that kind in the vicinity. There is no organization that I know of opposing religious

education in the public schools in Champaign, nor is there any organized movement against it that I know of. This religious education has helped me to understand the Jews and Catholics better. I was not taking the course in the schools. The Council on Religious Education has advanced understanding amongst the clergymen and religious people of the commu-ity. I say that this religious education in the schools has something to do with cooperation between Catholics, Jews and Protestants. I have found that it helps students to cooperate better with each other. The Catholics go to one group, the Protestants to another and the Jews to another. That helps us to cooperate. They are [fol. 208] put in different classes, because they differ in many things.

I do not believe that the matter of conscientious objectors during the war has been considered by this council. I have not said that that is not included in the religious tolerance. I said that was in the program of the council, but I will not admit of the fact it does not prove religious tolerance. As illustrative of what has been done in the way of teaching religious tolerance in the schools: A group of young people who were in these courses under Miss Chapin were concerned greatly with the problem of racial antagonism between Negroes and Whites. Under her leadership—this was not in the course but these young people were in the course and the course influenced it—they invited a group of Negro young people from a Negro church to meet with them in committee. They got along with one another and understand one another. I consider that a definite step growing out of the spirit of this enterprise, toward solving these antipathies. These were not Presbyterian Negroes. They were Baptists and Methodists. That is a specific instance. These Negroes belonged to a different church from the white people. The whites belonged to the Presbyterian. They met in the Presbyterian church. It grew out of the leadership of Miss Chapin in these courses.

Q. Was there anything to keep her from working in the church instead of the school?

Mr. Peterson: Objection as argumentative.

The Court: Sustained.

The Witness (Continuing): In the religious courses we endeavor to teach what is common to all. Whether we suc-

ceed I am unable to answer. I am not invariably familiar with what is being taught.

Mr. Franklin: I object on the ground that he is not [fol. 209] charged with having selected the subject matter in these classes nor with knowledge of that.

The Court: Objection overruled. I regard Mr. Franklin's examination as not cross-examination on the original examination, but original cross-examination—not permitted on cross-examination on these matters. I am not saying that Mr. Cartlidge was Mr. Chapman's witness, I am saying under the circumstances counsel got into more or less new matters brought out as if under cross-examination.

The Witness (Continuing): I am not aware that anything is being taught in the public schools of Champaign in conflict with the teachings of the Presbyterian church. I said that the Lutherans may participate in the organization and may teach in the schools too. I do not know whether they want to do so now or not. I said I heard it. I am ready to approve of them sending a teacher into the school. I would welcome the Lutherans but the council reserves the right in its cooperative movement with the Lutherans represented upon it that no prejudicial personalities or materials be put in the courses. We intend to protect the courses against antagonistic matter being taught. As far as we are able to we examine the material to be sure none is antagonistic to other religious organizations. I know of nothing which is being taught that is antagonistic to other religious organizations nor contrary to the creed of other sects.

When I said antagonistic I meant what was prejudicial, inciting contempt or hatred of other groups. I was thinking in terms of emotional disturbance upon the conflict that comes from our human relationships at times; not especially the matter of religion any more than labor or anything else in which human beings get together. We do not try to let [fol. 210] anything be taught that might start a fight. In this short course we have mutually agreed upon things as religious groups. In that we have unity. Then there may be things over which we may differ but over which we will not "scrap." Emphatically, there has not been a serious increase in diversity among the students who have been taking the religious education courses from those who did not.

We started with the Protestant, Catholic and Jewish all at one time. There were three teachers, one from each

group. I do not know that we have had an application from Jehovah's Witnesses to start another class. I answered before that I had heard that the Lutherans planned to start a Lutheran group. I have not had an opportunity to observe that the children of all the denominations are as well satisfied with Presbyterian and Methodist teachers as with a teacher of any other denomination. I have not observed the attitude of the Seventh Day Adventists toward the religious educational program in the Champaign schools. I did not even know they had expressed any attitude. I am not acquainted with them. I surmised there might be some in town but I do not know any of them. I do not claim to have taken in any of their doctrines into instruction because they have never applied to our council for membership. I have not inquired as to the attitude of the Quakers with reference to the religious education in the schools because they have never inquired of us. I have heard about the Unitarian church in Champaign. I presume that none of the religious teachers connected with this course are not represented by a church of some kind or are not affiliated with one of the larger churches here.

Q. What religion do you think is best for preventing juvenile delinquency?

[fol. 211] Mr. Franklin: Objection.

The Court: Sustained.

The Witness (Continuing): I have never looked into the question of whether one religion is better than another in dealing with juvenile delinquency. That question has come to my mind before. I would think that all are about equally good, speaking only of the ones within our council. I have had no contact with those outside of our council. I would say they are as good as those that are in.

Q. Let us take the Holiness Faith Healers. We have seen their pictures in the papers with snakes around their necks. Do you accept them as being just as good as Presbyterians?

Mr. Franklin: Objection.

The Court: Sustained. It has not been shown that they are involved in this particular controversy.

Mr. Chapman: I offer to prove by this witness that if he were allowed to testify he would testify that he regards

Presbyterians as better and more worthy than the Holiness Faith Healers.

Mr. Peterson: Objection, on the grounds that there is no showing that counsel has any foundation for the offer.

Q. In making your estimation and evaluation of religions, one being as good as another, do you accept the creed of the Holiness Faith Healers with their snake demonstrations on equality or par with the Presbyterians?

The Witness (Continuing): I would like to ask what the creed and the practices of the Holiness Church are. I do not know, so I cannot say whether I accept them as equal to my own. There were other denominations whose creeds I do not know well enough to compare with my own.

[fol. 212] Mr. Franklin: I object to the interrogation of the witness regarding any creeds or beliefs of which there is no evidence of their existence in this school district.

Mr. Chapman: The question of whether the teaching was secular or not does not depend on whether anybody in the school district agreed with it, but depends on whether there is a creed anywhere to the contrary. The New Webster Dictionary defines sectarian and includes not only believers but dissenters, any organized group.

The Court: Objection sustained, particularly on the ground suggested by Mr. Franklin, and I think there are other reasons why that question under the whole record is not proper.

The Witness (Continuing): With reference to this religious education class teaching democracy, our basic thought after God is that the brotherhood of man is the essence of all democracy. The Christian teaching that there is a Kingdom of Heaven I consider to indicate a democracy.

Q. Do you know anything about this religious teaching or the teaching of Christ that refers to officers of people being elected by the people?

Mr. Franklin: Objection.

The Court: Sustained.

Q. Can you point out a specific instance of anything taught in there that is democratic?

The Witness (Continuing): When I say democracy I am talking of the spirit and attitude, with an organization in harmony with the spirit and attitude. I state that the whole

thing is democratic. I am talking about political democracy because you cannot divorce politics from life or religion from life. I do not mean that politics and religion go together often.

[fol. 213] Q. When you speak of democracy are you speaking in a religious sense or a political sense?

Mr. Peterson: Objection.

The Court: He may answer.

The Witness (Continuing): I was considering them both. In connection with the religious education being taught in the public schools of Champaign County, everyone is representative and represented; they are all free to act; it is open to all on an equal footing. The political democracy which is being taught in these courses is the fatherhood of God and the brotherhood of man, which implies democracy. The fact that we teach the fatherhood of God and the brotherhood of Man implies democracy and relates to political democracy in the course. Besides that, the fact that all children who desire this course are welcome to take it or leave it alone if they so desire is evidence of democracy.

I did not say that the ethics of the children in the Champaign district have improved since the installation of religious education in the schools. I said the ethics of the children in the courses have improved.

Q. Can you name one child who has improved during the course?

Mr. Franklin: Objection.

The Court: Overruled.

The Witness (Continuing): I have a boy of my own who takes the course. I have found that when it comes to understand relationships with these young people, many of the things he has learned in this course make it easier for me to understand and to give him what I consider the ethical relationships between men.

Q. What was the condition of his ethics before he started taking the course?

[fol. 214] Mr. Peterson: Objection.

The Court: Objection sustained.

The Witness (Continuing): I think that I have seen a decided improvement in his attitude toward his sister.

Q. What was his attitude toward his sister before?

Mr. Franklin: I believe that has gone far enough.

The Court: Objection sustained.

The Witness (Continuing): This is religious education that is being taught. I do not know that that is instead of ethics. There is no separation between ethics and religion. The distinction is purely verbal, not in reality. I have read the dictionary definition and I know the distinction they make. There is no distinction. They are only parts of the same thing. I consider ethics as dealing with relationships of people with each other. Religion is the same thing. I would say that man's religion with God deals with ethics, and religion is the same thing.

May I state it this way: When I am on the stand I am a witness. When I go home I am a father or a husband. I am not different, but different terms are being used for different aspects of the same thing. When I say religion and ethics I am talking about different aspects of the same thing. Ethics are the relationships of honor, justice, truth, righteousness, understanding, sympathy, love, all of those terms which describe the values which we as human beings make use of as being liveable, ideal. Ethics is dealing with all those things in relationship between personalities and persons. Religion is the same thing because religion is relationship between Deity, who is a person or personality and other personalities that He has created. Ethics include the [fol. 215] relationships between man and his God. Morality and ethics are synonymous terms. Religion is the same thing, only in different aspects.

With reference to improving juvenile delinquency, the churches already have religious classes. They are kept from being able to deal adequately with the problem by lack of time. To discuss juvenile delinquency would take three or four days, to go into the real problem and the relation of the church to it. The reason for continuing these religious education classes in the schools instead of the churches is because of availability of the children of all denominations and religious groups. The children of all denominations attend the schools better than they attend church. We do not go there to reach children that do not ordinarily attend church. I have not noticed any increase in church attendance since the religious education was installed in the schools.

Q. What benefit have you observed with reference to an increase in religion?

Mr. Franklin: Objection.

The Court: Sustained.

The Witness (Continuing): I have not found the children more available to the religious education classes in the schools than in the churches. I would not say they are more available than for religious instruction. They are not available to the schools for religious instruction or education.

Q. It is not put in the schools for the purpose of being where the children are more available to it; is that right?

Mr. Peterson: Objection.

Mr. Franklin: It is argumentative.

The Court: Objection sustained.

[fol. 216] Q. Have you observed an improvement in the ethics or a difference in the ethics and morality in the juvenile delinquency among children who attend parochial schools and those who attend public schools?

Mr. Franklin: Objection, as not involved in this litigation.

The Court: Objection sustained.

Mr. Chapman: I offer to prove by this witness that he has not observed any improvement or any substantial difference between the juvenile delinquency of children that were attending parochial schools and those attending public schools.

The Court: He does not know anything about the delinquency of children in parochial schools.

A. No.

The Court: The objection to the offer is sustained.

The Witness (Continuing): I have read reports and sections of books that deal with the study by psychologists on juvenile delinquency in parochial and other schools but not relevant to the city of Champaign.

Recross-examination.

By Mr. Franklin:

I have ascertained that St. John's Lutheran Church are making application to the council. I understand that from

Rev. Kaiser. I cannot give you the exact number of how many different denominations are represented among the students participating in these classes in Champaign, but it is between 35 and 40 different denominations.

[fol. 217] ARTHUR G. CROMWELL, called as a witness on behalf of relator, having made affirmation in due form in lieu of being sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Arthur G. Cromwell, 440 Plymouth Avenue, South, Rochester, New York. I am an architect, the father of Vashti McCollum. I am a member of the sect of Free Thinkers of America, with headquarters at 440 Plymouth Avenue, South, Rochester, New York. I am familiar with their doctrine and teachings.

Q. What is the teaching of that sect with reference to Adam and Eve being the first man and woman?

Mr. Franklin: Objection, there being no showing in the record that any member of that sect is a member of School District No. 71.

The Court: Objection overruled.

Mr. Peterson: I object on the ground there is no evidence before us that the Society of Free Thinkers is a religion.

The Court: Objection overruled.

Mr. Franklin: There is no allegation in the complaint that Mrs. McCollum is a member of the organization.

The Court: Mr. Cromwell is the same person referred to in Petitioner's Exhibit A attached to the petition, wherein it states: "The relator adheres to the school of thought known as 'Rationalism' including atheism", and so forth.

Mr. Peterson: In that exhibit he specifically states that he does not have a religion.

The Court: The objection is overruled. We will hear the testimony subject to the objection.

[fol. 218] Q. State the doctrines and teaching of the sect known as Free Thinkers with reference to Adam and Eve being the first man and woman.

Mr. Peterson: Objection, unless it is confined to the Rochester Society of Free Thinkers, of which he is a member.

The Court: Objection overruled.

Mr. Franklin: I object, for the reason that the question assumes that the Free Thinkers Society, or Free Thinkers generally, are members of a sect.

The Court: Objection overruled.

A. We believe the Adam and Eve story is entirely fictitious and founded upon superstition. Adam had nothing to do with our ancestry, and especially the beginning of the earth.

Mr. Franklin: I move to strike the answer.

The Court: It may stand subject to the objection.

Q. With reference to the flood upon the earth by God as told in the Bible?

A. Science has proven that to be a scientific impossibility.

Mr. Franklin: I move to strike.

The Court: The answer will be stricken. The question was whether they believed it.

The Witness (Continuing): We disbelieve it. We teach that it is not true. We believe and teach that the miracles performed by Jesus are impossibilities, that a miracle is a violation of natural law. We believe that resurrection after death is a physical impossibility. We believe there are no such things as prophets. With reference to the Bible being the word of God, inasmuch as we can find no evidence that God ever wrote it and we have no authority for accepting that writ, we deny it being God. The Free Thinkers teach that. We deny the existence of God.

[fol. 219] Cross-examination.

By Mr. Peterson:

We say that God is from the imagination. I believe that religion is a chronic disease of the imagination, contracted in childhood. I most emphatically hold to the thought that religion is born of fear, ignorance and superstition. I also hold that from the first day that the first crook realized he could hoodwink a few credulous beings into believing he had some personal tie-up with an unknown deity religion and its unscrupulous preachers have fought to perpetuate

the racket that permitted them to prey upon the innocence and credulity of the masses. I believe the Bible contains so much that is bad, so little that is good and little or nothing that is true, that it seems impossible that anyone who has read and studied it would recommend it as fit for our youth to read, much less use as a moral inspiration.

I did not say that all preachers or ministers of the Gospel are unscrupulous. There are exceptions to all rules. We do not have preachers in the Free Thinkers, or ministers, but they are welcome. My office is the headquarters of the Rochester Society of Free Thinkers. We hold our meetings down town. I am the head of it, and have been since 1938. I say that the Old and the New Testaments show and prove that the Bible is not a fit book to be read or believed in by the youth in our public schools. I absolutely refuse to believe there is a God until he makes his personal appearance to me and until I can hear whatever is God talk to me in my presence..

We take the position that we have no knowledge of such a thing as God. I do not admit the possibility of a God from any evidence now in existence. We do not believe there is a God. I am proud to say I am an atheist. I did not pretend to teach my children any particular philosophy. [fol. 220] I permitted them to go to the various schools and churches. What natural philosophical knowledge they acquired they gained from me and from my home and from other places where they went.

Q. Did you criticize the Bible in the presence of your children?

Mr. Chapman: Objection.
The Court: Sustained.

Q. Did you do anything to influence their decision?

Mr. Chapman: Objection.
The Court: Sustained.

Q. Do you want all others to subscribe to the same philosophy as you do?

Mr. Chapman: Objection.
The Court: Sustained.

Q. Do you object to the reading of the Bible by anyone?

Mr. Chapman: Objection.

The Court: Sustained. I understand he is not a party to this suit, but was put on merely to express what the doctrines of the Free Thinkers were.

Mr. Peterson: It shows his interest. That is what I was questioning him about.

The Court: The objection is sustained.

Mr. Franklin: If they put a witness on the stand to testify about the doctrines and tenets of his belief, then we have a right to inquire if those beliefs, doctrines or tenets is the propagation of his belief among other people or whether it does not include them.

The Court: The objection is still sustained. The Court is taking notice of the entire pamphlet attached to the complaint.

The Witness (Continuing): I have never been in a fox hole and I am not entitled to answer whether the soldier in [fol. 221] the fox hole who is in physical danger at the time, who has any belief in God, predicates that belief solely upon fear and superstition.

Q. You have never felt any spiritual contact in any way, shape or manner?

Mr. Chapman: Objection.

The Court: Sustained.

Q. Have you never in your life felt what is commonly known as the religious spirit?

Mr. Chapman: Objection.

The Court: Sustained, as not within the purview of the direct examination.

Q. You believe what your organization believes don't you?

Mr. Chapman: Objection.

The Court: He may do that and still have some belief of his own.

The Witness (Continuing): I believe the beliefs of my organization. I believe that when persons pray they think they are teasing God.

Q. Do you believe that when the President of the United States makes a proclamation of a day of prayer that that is the equivalent of asking the people to tease God?

Mr. Chapman: Objection. He keeps asking this witness what he believes.

Mr. Peterson: Your organization.

The Witness (Continuing): We believe it is a violation of Constitutional law as far as using the power or duty is concerned. We believe that when the President sets aside a day for prayer that is unconstitutional. When the president proclaims:

"At a time when stars hang in the windows of the nation's homes to honor the absent warriors; when millions of Americans live in temporary homes and in migrant centers while [fol. 222] they work at war jobs, it is important to urge that the religious education of the country's children be fostered and extended.

"It is likely that there are millions of youngsters who need initial and basic religious instruction. They should receive it and learn of the fatherhood of God and the brotherhood of man."

that a statement of that kind is based upon ignorance and superstition and cowardice.

Recross-examination.

By Mr. Franklin:

Q. Do you contend that the Free Thinkers' Society is a religious sect?

Mr. Franklin: Objection.

The Court: Overruled.

A. Webster's Collegiate Dictionary defines religion as loyalty to an ideal.

Q. Is it not true that every dictionary defines religion as the relation between man and a Supreme Being?

Mr. Chapman: Objection.

The Court: He may answer.

The Witness (Continuing): That is a part of the same definition. It is absolutely true that I do not contend that I am a member of any religion, religion being the relationship between man and the Supreme Being. We are not a member of any religion within the definition of religion as the relationship between mankind and a Supreme Being. Neither are atheists.

Q. Is it a tenet or belief of the Free Thinkers Society that persons are entitled to make a free choice between re-

ligion or irreligion, untrammelled by exclusive education in one subject?

Mr. Chapman: Objection.

The Court: He may answer.

A. Not when it is supported by state funds.

[fol. 223] Mr. Franklin: I move to strike the answer.

The Court: Strike it.

The Witness (Continuing): I do so believe. It is a tenet of the Free Thinkers Society that persons should be given an opportunity to learn both about religion and atheism. It is a tenet of the Free Thinkers Society that books by atheists concerning their beliefs should be excluded from the public schools.

Q. Do you believe that the works of Voltaire and Thomas Paine should be excluded from the public schools?

Mr. Chapman: Objection.

The Court: He may answer.

The Witness (Continuing): I do not believe that they should be excluded from study as a text book. It should not be in the library, nor should the Bible. I believe that any book of any philosophy teaching atheism should be excluded from the public school curriculum. I believe as stated in my pamphlet that religion is an insane desire to appease an impossible deity. I believe that all persons who embrace religion are insane to that degree.

Mr. Chapman: Objection.

The Court: He may answer.

The Witness (Continuing): I certainly believe that every minister of the Gospel is insane to that degree. They are following an insane and dishonest occupation. That applies to Rev. Philip Schug whom I know and who sits across the table from me if he taught the doctrines of which you are talking. If he believed in the divinity of Jehovah I would believe that he was insane and dishonest. I feel exactly the same way about beliefs in other Gods than Jehovah. I believe that very minister who believes in any God is insane and dishonest to that degree at least. I met Rev. Schug [fol. 224] yesterday for the first time. From then I had an opportunity to observe him.

Q. You believe those things to be true of him?

Mr. Chapman: Objection.

The Court: That has been asked and answered.

The Witness (Continuing): The statement in my pamphlet, "When religious groups begin to lay aside their own political ambitions and unite to promote harmonious and constructive citizenship, then will they be qualified to build character," is subscribed to by the Free Thinkers Society of which I am a member.

I still believe that myself. If the religious groups represented by some of the witnesses who have appeared here fall within that definition I believe them to be qualified to build character.

I am interested in the result of the litigation here. It is not true that I talked to Mrs. McCollum regarding the institution of this suit. She recently made a trip to Rochester to visit with me. Naturally I spoke to her regarding this suit. The purpose of my visit here at this time is to be present at this trial.

Q. You would personally be dissappointed if she did not prevail in the suit?

Mr. Chapman: Objection.

The Court: Overruled.

The Witness (Continuing): I certainly would.

James Terry McCollum, called as a witness on behalf of relator, having made affirmation in due form in lieu of being sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is James Terry McCollum, 1118 West John, Champaign, Illinois. I am ten years old. I have been attending South Side grade school in Champaign, sixth grade. [fol. 225] Last year I attended Dr. Howard School in Champaign, fifth grade. My teacher there was Mrs. Taylor. Religious education was taught there by Miss Chapin. I did not take the course last year. Another child in my class room did not take it, Elwin Miller. Elwin started the course later. After that I was the only one in Mrs. Taylor's class who did not take religious education.

I think it was held on Thursday in the morning, after spelling or arithmetic, I have forgotten. Miss Chapin taught religious education in the Dr. Howard school last year. When she came to Mrs. Taylor's class room I went out to the music room or over to the library, and once I went out in the hall. During the first part of the year, while Elwin Miller did not take the course, he went with me. The music room and library were on the same floor as my class room. After Elwin Miller joined up in religious education Mrs. Taylor would go with me to the music room or the library dur g the religious education period, every time.

Q. Did she ever stay in the class room where the religious education was being taught?

Mr. Franklin: Objection.

The Court: Sustained.

The Witness: (Continuing.) I mean that after Elwin Miller began taking the course and I was the only one who did not take it, Mrs. Taylor did not go with me to the music room or to the library during that period. She was in the class room listening to the religious education. Once she sent me out in the hall. I did spelling there. I had a desk out there. When I was out there on that occasion the kids that went by teased me. I never left the building during the class in religious education. During that period when I did not have any studying to do I read a book. She never [fol. 226] allowed me to go out to play while they were taking religious education.

Mrs. Taylor spoke to me with reference to taking religious education. Sometimes that was in the class room, sometimes in the library and sometimes in the music room. On these occasions when I was in the class room maybe there were a few children doing school work at the time; in the music room and library Elwin Miller would be the only one present. I also talked with her about it when I was alone with her. In the music room she said the same thing she had said other times: "Why don't you keep the class 100%." She said to me I would get along better if I did take it.

Relator's Exhibit 2 for identification is the card which Miss Roloff, my teacher, passed out the first day of school, this year. She is my teacher now. I don't know if she passed out any more cards to any other children at the same time. I was in the class, at my desk, when she gave

it to me. All the pupils were present. They all got one of these cards. She said to bring the cards back as soon as we could. She said: "Hurry up, return them, get it over with."

(Whereupon Relator's Exhibit 2 was offered and received in evidence without objection.)

Relator's Exhibit 2, being a card, which is in words and figures as follows:

[fol. 227] RELATOR'S EXHIBIT 2

"CHAMPAIGN COUNCIL OF RELIGIOUS EDUCATION

1945-1946

Parent's Request Card

Please permit —— —— in Grade —— at —— School to attend a class in Religious Education one period a week under the Auspices of the Champaign Council of Religious Education.

(Check which)

Date —— ——

( ) Interdenominational
( ) Protestant
( ) Roman Catholic
( ) Jewish

Signed —— ——
(Parent Name)

Parent's Church —— ——
Telephone No. —— —— Address —— ——

A fee of 25 cents a semester is charged each pupil to help cover the cost of material used.

If you wish your child to receive religious instruction, please sign this card and return to the school.

Mae Chapin, Director."

The Witness (Continuing): Mrs. Taylor said about the same general thing in the music room that she said in the library and the class room. She talked a little about my fighting, why I got in fights, and stuff like that. When Mrs. Taylor testified here yesterday that some of the other children complained to her that I kicked them and slapped them and spit in their faces those complaints were true, although not exactly the whole truth. They beat up on me

and I did not have anything else to do. I was younger than they.

Q. Did they beat up on you first?

Mr. Peterson: Objection.

The Court Sustained. Do not lead the witness.

The Witness (Continuing): I do not know whether they beat me before I slapped, kicked and spit in their faces. [fol. 228] I guess they did—I don't know—both did—yes. I did not do as much as they said. Mrs. Taylor sometimes said she might do something about it. I left. She said that is why I got in fights. I mean the reason why I did get in fights and stuff like that. She said I should learn to fight my own battles. She was talking to me when she spoke about getting along with the other children. I heard them complain to her about it. I have forgotten what she told them when they complained to her. Sometimes she did say something to me when they complained. She said I should not do that because I would get in fights, things like that. I heard her speak to the other children when I complained about them, but I have forgotten what her words were.

Q. Did she ever say anything to you in regard to taking religious education when these complaints were made one way or another?

Mr. Peterson: Objection as leading and suggestive.

The Court: Sustained.

The Witness (Continuing): I was interested in this class in religious education. I wanted to take it. My mother never consented. She did not sign a slip so I could take it last year. She signed one for the year before. I took religious education at the end of the year before when I was in fourth grade.

Q. What was there about this religious education that attracted your attention?

Mr. Franklin: Objection. What attracted him would not be relevant.

The Court: Objection overruled.

The Witness (Continuing): I did not like to be out in the hall and in the music room with the door shut, and I wanted to hear Miss Chapin's opinion. I do not recall right

now anything else that interested me in religious education. [fol. 229] I knew that other children were taking the course.

When they sent me out of the room I usually did arithmetic and sometimes spelling. I do not like arithmetic and spelling very well. I like religious education a lot better. I recall that Miss Chapin brought in school a lot of different papers and things, and sometimes the kids passed one on my desk. I was also interested in the little ornaments she brought from China and different places.

Cross-examination.

By Mr. Peterson:

I have lived at this address in Champaign since I was a little boy. I took my first grade work in South Side School. I did not have any difficulties when I was in first grade. I had about as many difficulties in the second grade as I did in the first. During the time I was in second grade the teachers did not talk to me about my fighting. In the third grade I did not get into fights. I got in a few fights in the fourth grade. That was all through the year. The last half of the fourth year I took the course in religious education. My teacher was Miss Stocks in the religious education class that I took the last half of the fourth year. After I finished the fourth grade I transferred to Dr. Howard School. The other children in my neighborhood went to the South Side school except one girl, who went to Howard.

When I got to the Dr. Howard School I had some difficulties with the other pupils. The teacher talked to me about that, usually in my room. They did not call me into another room to talk to me about it very many times. At Dr. Howard School they did not send children to the principal when they talked to them about doing those things. It was al- [fol. 230] ways the teacher that talked to the pupils. I could not tell you how many times she talked to me about fighting and spitting in their faces and things like that, quite a few, though. In the South Side School spelling did not come hard for me. I studied a lot harder on spelling when I was in the fourth grade than when I was in the fifth grade. I did not do very good work in the fifth grade. The teacher spoke to me about it a little. She wanted me to do more studying in spelling and arithmetic. Mrs. Taylor was my fifth grade teacher.

Q. Did you like her as a teacher?

Mr. Chapman: I object.
The Court: Sustained.

The Witness (Continuing): When I got to that school they passed out cards the first of the year. I knew what they meant. I knew I could take the course in religious education if my parents would permit me to take it. One of the reasons I liked to take the religious education course was because I was anxious to know the way they taught them.

When I was at the South Side School I saw a good many children going to Sunday School. I go to Mr. Schug's Sunday School when it is open. I started about the second semester last year. When I was in fourth grade of school Mr. Schug had no Sunday School. At that time I did not go to Sunday School. I did not very much want to go, in a way I did and in a way I didn't. I kind of want to know a little more about religion. I do not know much about it. Now I know a lot more than I did. As I got older I learned more and want to know still more. After I took the course when I was in the fourth grade I wanted to learn still more. I enjoyed the work over there. I told my mother and father that I enjoyed it. I don't know if I told them [fol. 231] that I wanted to know more about religion. I think I did.

When I was in Mrs. Taylor's class there was only one time that she had me sit in the hallway. Some of the boys that passed back and forth going to the bathroom I knew. I cannot recall their names. One boy that I think I remember was in third grade.

Mrs. Taylor remarked about making the class 100% when she passed out the cards. I know she talked about 100% when she passed out those cards. I know she talked about 100% in connection with the stamp drive, but she said it about the religious education too. I don't know how many times she said that in my presence or to me when I was in the library. Perhaps three or four times. That included the music room. Elwin Miller is about the only one I knew who was present at any time when she said that.

When I was in fourth grade I signed up as a cub scout. I am not a boy scout. I do not think I want to be one. I think it would be too hard work and I think I could get better to do. I know that a boy scout and a cub scout has

to take an oath. I do not care if I have to take the oath or not, it is O. K. with me.

Q. When you came into this court room here did anyone ever ask you not to take the oath or did you ask not to take the oath?

Mr. Chapman: I object, he took the oath.

The Court: Sustained.

(Whereupon the following proceedings were had at the bench in the presence of the Court, away from the witness.)

Mr. Franklin: Mr. Cromwell affirmed before the court without oath. I call the court's attention to the fact that there was nothing in the record to show that he had asked [fol. 232] to be sworn in that way. It is our position that under the law unless the witness asks to be excused, the accepted procedure is to swear on oath by the ever living God; it is only upon conscientious scruples that a witness may avoid taking the oath. * * * We are entitled in this case to have the conscience of the witness pledged to veracity, and I would like to ask the privilege to ascertain by this witness whether his veracity is being guaranteed by any conscientious scruples.

HALLIE B. SNYDER, called as a witness by the court, out of the presence of the witness, having been duly sworn, testified as follows:

Direct examination.

By the Court:

My name is Hallie B. Snyder. I am deputy Circuit Court clerk of Champaign County, Illinois. I have been administering oaths to all of the witnesses in the case so far. Prior to the convening of court yesterday, Mrs. McCollum came to me and asked whether we had another oath that could be administered to her, to her father and to her son. I replied that the only oath was the one we give to witnesses, and that if she did not want to be sworn by that oath we could give the affirmation. She requested that she, her father and son be given the affirmation in place of the regular oath to the witness.

Cross-examination.

By Mr. Franklin:

Mr. Cromwell did not make any such request of me, nor did the witness on the stand, James Terry McCollum. Yesterday noon Mr. Cromwell asked me whether or not I would give him the affirmation in preference to the oath.

[fol. 233] ARTHUR G. CROMWELL, heretofore called as a witness on behalf of relator, having duly affirmed, resumed the stand and testified further as follows:

I mentioned to Mrs. Snyder that I would prefer when giving my testimony to do so by affirmation rather than by the oath administered to the other witnesses. I did it to avoid embarrassment to myself or the court; I have tried to avoid sensationalism.

Cro s-examination.

By Mr. Franklin:

Were I to take an oath and swear to an ever-living God I would be telling a lie because I would not believe in it.

Mr. Franklin: I move to strike all of the evidence in the record as to the witness on the stand.

The Court: This is a boy of tender years. I doubt very much that the boy understands what the nature of an oath is. His testimony will be received for what it is worth in the mind of the court. The proper procedure in a case of one of tender years is to ask that he understands that he is required to tell the truth, and if so, why. That was not asked by either side.

(Whereupon the examination of the said James Terry McCollum was resumed in open court:)

When I stood before Mrs. Snyder I did not hold up my hand. I said I would rather not have it with the oath. I affirmed that I would tell the truth. That means to tell the thing that is true, what is right. I know that I am to tell the truth to the court. If I did not tell the truth, as far as I am concerned, I would be thrown in the jug.

[fol. 234] By "jug" I mean jail.

I attended the class of the University of Illinois known as a demonstration school during the summer. We took social studies. At that school they said the Lord's Prayer. I did not know the prayer when I went there. As soon as I got to know the prayer I joined in with the other pupils. I have forgotten all of it now. They all sang hymns as well as other songs. The only one I know was Glory, Glory, Hallelujah. I tried a little bit to learn those songs, not my very best. I did my very best in music, my favorite subject. I don't think I did my very best in spelling nor arithmetic.

At the summer school I read a Bible story aloud in class. At other times other children read them to the class. When a pupil got up during this summer school to read a Bible story the rest of us would sit and listen. When it came our turn we would choose our own story. I chose something about Adam and Eve.

Redirect examination.

By Mr. Chapman:

When I was attending the demonstration school my mother made no question to me about reading the Bible or participating or about singing religious hymns with other people. With reference to Mrs. Taylor's remarks about 100% in her class, my estimate was that she made it three or four times.

When I was sitting out in the hall, when Mrs. Taylor sent me out, I looked right at the children who passed, a few of them. Before I went to fourth grade I did not take any par- [fol. 235] ticular interest in Sunday schools, churches or religion. I took no religious education before fourth grade. I do not remember my mother giving me permission to study Bible at the university. She does not care if I do or not. I remember a teacher, Mrs. Janke. I studied Bible with her. My mother did not care as far as that was concerned. She probably said yes, although I am not sure.

The Court: What she probably did will be stricken.

The Witness (Continuing): My mother knew I was reading the Bible there.

The reason I said that some ways I wanted to go to Sunday school and some ways I did not is that I wanted to learn more about religion. I did not want to go because I think I would feel kind of funny there, being an atheist, not believing in God.

With reference to Mrs. Taylor talking to me about fights in the first, second, third and fourth grades, and the teachers I had before I had Mrs. Taylor, they did not talk to me about fights any more than to the other children.

Recross-examination.

By Mr. Peterson:

I have not talked over with anyone the reasons I did not want to go to Sunday school or take religious education classes. If I did it was with my mother, but not about the Sunday school, only the religious education classes. When I was a little fellow in fourth grade I called myself an atheist but I didn't know its meaning. I knew why other children went to Sunday school, because their parents believed in God and stuff like that. When I called myself sort of an atheist I meant I said to myself that I did not believe in God. I said to myself I did not believe in God before I went to kindergarten. The only one who talked [fol. 236] to me about not believing in God was my granddaddy, who said it was just bunk. That was when I was in kindergarten. There when we drank milk we said a prayer, and he objected to it. I finally won his opinion. I kept keeping going on like that, and I still had the same idea in my mind. I finally won out and he finally let me say the prayer in kindergarten. In the prayer I think we thanked God for the stuff we ate. It was a kind of a little prayer. I was about five years old when I went to kindergarten.

When I was going to the Dr. Howard school, fifth grade, I saw children in my neighborhood going to Sunday school. During that year I went to Mr. Schug's church. We have no church in our neighborhood within a mile. The book we used there deals with "primitive beliefs." When we are saying the prayer we are not speaking to God or anything. I do not know who is supposed to be speaking. As far as I am concerned, it is just a bunch of words.

Recross-examination.

By Mr. Franklin:

I was a cub scout a couple of years. I like it. I enjoy cub scouting. I won some medals. I do not care about the scout oath. If they did not have the oath I still would not want to go on with it. The oath does not bother me, but

I do not like all the boy scouting ideas. I do not like to get more work to do. The boy scout oath contains a statement of belief in God.

Mr. Chapman: Objection.

The Court: Sustained. It has been gone over.

The Witness (Continuing): I have no objection to taking such an oath, in this court room or anywhere. It would be O. K. with me if I had that kind of oath, but I would rather [fol. 237] have the one I took. I made no request to be excused from taking an oath to God in this case, my mom did. I still want to learn more about what others believe with reference to God. As far as I am concerned there is no evidence; I mean I do not know about that. My grandfather has never found any evidence of God nor have I.

Q. What have you looked for in the way of evidence of God?

Mr. Chapman: Objection.

The Court: Sustained.

Q. Have you made any effort to find out whether or not there was a God?

Mr. Chapman: Objection.

The Court: Sustained.

Q. Aren't you a little in doubt as to whether there is or is not a God?

Mr. Chapman: Objection.

The Court: Sustained.

The Witness (Continuing): I think I spoke with one cub scout about my religious beliefs. That was when I heard about the boy scout oath. I was in fourth grade, maybe fifth. I make no secret among my playmates and acquaintances that I am an atheist. From some of the kids in school I tried to keep it secret, but I suppose everyone in the City of Champaign knows it now.

Q. That is because of the pendency of this suit?

A. Yes.

Mr. Chapman: Objection.

The Court: Sustained.

The Witness (Continuing): I have felt no sense of shame about being an atheist. I sort of enjoyed being different from other people with reference to the matter

of God. I am rather proud of the position in which I am [fol. 238] put by not believing in a God. In a way it is sort of fun to be an atheist; in a way it is not.

Redirect examination.

By Mr. Chapman:

The reason I wanted to keep that secret from some of the children in school was because I would get teased, because the majority believed in God and the kids usually tried to tease me. My mother was the one who suggested my going to Rev. Schug's Sunday school. That is the Unitarian church. I have talked with my mother about this case. My mother was home yesterday evening.

Q. What time did you talk with your mother about the case yesterday after court closed?

Mr. Franklin: Objection. He is their witness and they cannot treat him as a hostile witness.

The Court: Overruled.

The Witness (Continuing): I do not know exactly what time it was. My mother told me to say the truth in court.

Q. Did she tell you what you should tell?

Mr. Franklin: Objection.

The Court: He may answer.

A. No.

Q. Did you use your own mind for that?

Mr. Franklin: Objection.

The Court: Sustained.

Q. Did anybody else tell you anything you should tell beside the truth?

Mr. Franklin: Objection.

The Court: Sustained.

The Witness (Continuing): The children teased me about being an atheist; it would be when the teacher was not around. They always did that whenever she was not [fol. 239] around. I know the names of the boys in the fifth grade class with me last year. All of them that knew I was an atheist teased me. I can't remember what children. They found out I was an atheist. Some I had

told and some found out. I told some in the fifth grade the beginning of the year and the rest of them found out because of the lawsuit. When I was in the fourth grade at South Side a few of the ones that knew I was an atheist teased me, but they forgot, they did not tease me all through the year, they kind of forgot about it. When they teased me it was soon after I told them I was an atheist. Billy Bradley is O. K. I don't know if he does or not know I am an atheist. He never kidded me. Kids around my neighborhood are good pals of mine. They kid me about being an atheist. They are little kids who do not pay any attention to atheists. An atheist is one who does not believe in God or the Bible or anything that has to do with religion.

Redirect examination.

By Mr. Chapman:

Before this case was started I talked with the boys in the neighborhood about being an atheist. I didn't talk very much with the students in school about it before this case was started. When they teased me I didn't listen. The students asked me why I was not taking religious educatica. I told them I did not want to at the time. I probably told them more, I am not sure.

Recross-examination.

By Mr. Franklin:

One of the boys who asked me why I did not take religious education I think was Jimmy Dodds. He was in my class but he is not a friend of mine. Sometimes I [fol. 240] played with him in football games. It is not a fact that he himself did not take religious education at South Side in my grade. He never teased or bothered me about it but he did ask.

Mr. Franklin: I move to strike all of the testimony of James Terry McCollum because it appears from his testimony that he did not have conscientious scruples against the taking of the oath provided by law.

Mr. Peterson: We join in the motion.

The Court: The motions are denied.

REV. ERWIN A. GADE, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Rev. Erwin A. Gade, Argo, Illinois. I am minister of the First Congregationalist Church in Argo, and have been for four years. I am familiar with the doctrines and teachings of that church and am acquainted with the system of religious education conducted on released time from school.

In our community a church started it and is using the community building. The children who have permission from the parents are excused from the public school to attend religious instruction once a week.

Mr. Franklin: Objection, and move to strike the answer.
The Court: Objection sustained, and answer stricken.

Q. Have you done anything with reference to released time from school for religious education?

Mr. Franklin: Objection.
The Court: Sustained. This has nothing to do with [fol. 241] School District No. 71 in Champaign County, or within school buildings within the City of Champaign.
The Witness (Continuing): I have known about released time for religious education in Champaign since it became an issue in Springfield, in the legislature. I went down there and I know a minister in Champaign, and I know that there have been several religious groups that were not invited to participate in the program.
Mr. Franklin: Objection.
The Court: I will strike the part of the answer about any groups not asked to participate.

Q. What were you doing in Springfield?

Mr. Franklin: Objection.
The Court: Overruled.

A. I was testifying against the McCook Bill.
Q. Were you opposed to released time?

Mr. Franklin: Objection.
The Court: Sustained.

Q. Are you opposed to released time for religious education?

Mr. Franklin: Objection.

The Court: We will hear it subject to the objection.

A. Yes, I am opposed. I am not an atheist.

Mr. Franklin: We are objecting to the relevancy of this testimony and its materiality, and this witness' testimony with reference to his attitude, whether in favor or against it. His experience would be hearsay as to religious education in this district.

The Court: Is it agreeable that the objection may be considered as being made to the entire line of the examination?

[fol. 242] Rev. Carl Baehr, called as a witness on behalf of relator, having been first duly sworn, testified as follows:

Direct-examination.

By Mr. Chapman:

My name is Carl Baehr.. I live in Chicago, Illinois. I am a minister, affiliated with the Congregationalist Church of Chicago, and have been for five years minister of the United Congregational Church of Chicago. I am familiar with its doctrines and teachings. I am familiar with the system of religious education called released time for religious education.

Mr. Peterson: The same general objection.

The Court: The same ruling as was made in regard to the testimony of Rev. Gade.

The Witness (Continuing): My understanding of released time is the general system of releasing the school children from one hour of school for religious instruction either in the church building or within the school property. It could be almost any period of time that seems agreeable to the school authorities.

Q. Are you in favor of that kind of a system?

Mr. Peterson: Objection.

A. I am opposed to that kind of a system.

Mr. Peterson: I move to strike the answer.
The Court: It may stand subject to the objection.

Q. What have you done with reference to your opposition to such system?

A. We have had a real discussion before the board of deacons and the church organization felt that it was too much diversified instruction, and we are opposed to it.

Mr. Peterson: Objection, and move to strike.

[fol. 243] Q. Do other people in your church work with you against this system?

Mr. Franklin: The same objection.

A. They have.

The Court: I will let it stand.
The Witness (Continuing): I am not an atheist, nor are the people who work with me.

Cross-examination.

By Mr. Peterson:

My religion is the Congregational Christian. I graduated in 1942 from the Chicago Theological Seminary. I am not certain that my church organization as a body has taken any definite action on the question of released time. There has been no general council meeting since this issue has been brought up. Certain individuals have been in the movement for and certain individuals against. As a denomination they have not supported released time instruction.

I have given this subject considerable study. I have read the various articles written on the subject by Prof. Allerton and a number of others who have not only written but have spoken on the subject. Prof. Allerton is connected with the Chicago Theological Seminary, of which I am a graduate. Rev. Erwin Gade attended the same school.

Cross-examination.

By Mr. Franklin:

Our national church organization has a curriculum committee. I do not think it operates alone for the purpose of determining the curriculum to be used in these classes but

it is for the general curriculum in the Sunday school and with all kinds of preachers. The curriculum committee may as a committee have voted to continue to support weekday [fol. 244] religious instruction or education throughout the nation and throughout my denomination, but they have never brought it within the council and to the congregation of the Christian Denomination which operates through its council, and the board can be challenged at any time under such conditions.

Q. Has it ever been challenged with reference to this?

A. I rather presume it will be challenged at the next council.

I represent myself as an interested individual. I am not a taxpayer in School District No. 71 and I am not a resident thereof. My only interest in your welfare is the interest which I have in the welfare of all human beings.

Redirect examination.

By Mr. Chapman:

I am a citizen of the State of Illinois and interested in the citizens of Illinois and in their welfare.

Prof. Allerton is one of the professors of religious education in the Chicago Theological Seminary. I have not conferred with Prof. Allerton with reference to the study of this subject.

Q. With reference to your own church, do you find that all the people in your church are in support of the program of Dr. Shaver?

Mr. Franklin: Objection.
The Court: Sustained.

Q. Do you know of any plans being made within the church by people who are not atheists with reference to obstructing the movement for released time for religious education in the future?

Mr. Peterson: Objection.
The Court: Sustained.

Recross-examination.

By Mr. Peterson:

[fol. 245] I do not think I graduated at the same time as Rev. Gadé. I think we were there together. We have both been in the ministry about the same length of time. We attended a few classes together.

Redirect examination.

By Mr. Chapman:

Q. Are you familiar with other ministers from the same school who oppose the system?

A. I am.

Mr. Peterson: Objection.

The Court: Sustained.

Mr. Chapman: I want to make it clear that we are not opposing religion, that the purpose of this suit is not to oppose religion, that it is not an issue at this time, nor do we oppose it because some of our people are atheists.

Mr. Franklin: I object to the speech and move to strike it from the record.

The Court: He has the right to state the purpose for which he offers testimony. It may stand.

Vashti McCollum, the relator, called as a witness in her own behalf, having made affirmation in due form in lieu of being sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Vashti McCollum, 1118 West John Street, Champaign, Illinois. I am a housewife. Last year I taught dancing. I am a student at the University of Illinois, in the pre-medical course. I have a degree from the University of Illinois. I majored in political science and studied some law. I taught dancing in the physical education department [fol. 246] at the Illinois Union Building beginning in October, 1944, and ending in the latter part of May, 1945. It was a part time assignment. The next semester I took

more college work. I was on an hourly basis instead of assignment.

Q. Have you ever been invited to go back and teach any more since this case was filed?

Mr. Franklin: Objection.

The Court: Sustained.

The Witness (Continuing): I am married and have three boys, James Terry, 10; Donald, nearly 8; and Ariel, 5. The two older boys attend the South Side School. Ariel is in first grade in a private school. Last year Terry attended Dr. Howard School in Champaign, fifth grade. He brought me an application card with reference to religious education in the Dr. Howard School last year. I did not return it signed. I filled it out and sent it back. I never signed a permit for Terry to take religious education in the Dr. Howard School while he was in fifth grade. Mrs. Taylor was his teacher there. I became acquainted with her. I had a conversation with her about Terry in regard to the religious education. As I recall, the first conversation with her was in my car, around November or December. Miss Gleason, another Dr. Howard teacher, was in the car.

I asked her how Terry was getting along in his school work and with the other children. She said she believed his work was improving, he had started behind and had to work to catch up, and she thought he was making some improvement. As far as the children were concerned, he was not doing too well. I asked her if she had any ideas on how to improve the situation. She said the children did not take it from Terry, whereas they might have to accept it [fol. 247] from one another. In answer to my question about suggestions to better Terry's association with his fellow students, she said that perhaps if he would join the religious education class it would help; it would be participating in things in which they participated, and she suggested changing his cub scout affiliation from the South Side to the Dr. Howard School; that it would tend to improve his association to be with those other children in participating with social things, in as many different fields of activity as possible with the other children in the school and in his particular class especially. I told her I was anxious to help him in every way possible and had not considered allowing him to take religious education. It was not that I feared that anything taught in those classes would be harmful to

Terry, but that I was bitterly opposed to the whole system as being undemocratic. To my way of thinking it defeated the constitutional principle of the separation of church and state. I thought I was being a hypocrite if I allowed him to join in when I opposed it bitterly, merely for the purpose of having him conform to the rest of the children. I did not think the teaching would harm him or make much difference either way. My concern was that it was a means for the breaking down of the separation of church and state. I realized in taking this stand against religious education classes participation it was doing Terry harm, making it hard for him. I felt that in the long run it was the only action that I myself could take.

I told Mrs. Taylor that I could not subscribe to the doctrines that were taught in the religious education classes. I did not take issue with the classes for that purpose, saying that anything Terry would learn in those classes would [fol. 248] be perfectly all right with me. After all, I would just as soon let it be presented with all the conflicting views. I did not approve anything of the miraculous or superstitious nature; it was not in accord with my views or with reason, and I could not bring myself to consider it. I had some conversation in which she told me that Terry wanted to take the course in religious education, and she told me of one instance where the door had been left ajar and when she stepped out of the room Terry's ear was glued to the door to hear what was going on in the class room.

I had another conversation with her probably in March, 1945, in the hallway in the Dr. Howard school, just outside of her room. Only Mrs. Taylor and I were present. I asked her if Terry had to wait in the hall that day and she said he did during the religious education class; that he was provided with a desk and there was sufficient light, and he had books and material to work with. She said that she was not aware that there had been any feelings on Terry's part. I told her he had come home crying, very much upset, and had said that he sat in the hallway and that children going through the hallway and seeing him there had assumed he was there for punishment, since occasionally if a child does not conform he is seated in the hallway, and that was the assumption upon which the children had ridiculed or teased him. He was very much upset. She said she was sorry, that ordinarily Terry had been allowed to sit in the music room.

I told her that Terry was never satisfied with that arrangement because it adjoins the teachers' wash room and the door into the hallway was usually closed and he did not like to sit in there by himself. She asked me if I thought [fol. 249] there was a possibility he was saying that as an argument to persuade me to allow him to take religious education. I admitted the possibility, but told her I had plenty of evidence at home that he did not like to be in a room by himself. I told her that no boy of mine within the regular school period was going to be made to sit in the hall, to be subjected to ridicule, condemnation or questioning, or in a music room where any teacher would know why he was there or would question why he was there because he was not taking a course in religious education. I told her that to my way of thinking it was definitely beyond the scope of a public school, that the public school was a democratic organization, that I did not want anything brought into the public schools that would have anything but a democratic effect on the children, and for that reason I was keeping my son out of it, and that I did not expect that he was going to be set apart because of it. I felt it should not have been in the schools in the first place. I told her I was going to see Mr. Mellon about it that afternoon. She said she thought that is what I should do. I was not blaming Mrs. Taylor for Terry's sitting in the hall and being ridiculed. It was just the result of the whole situation of presenting religious education in the public schools and that I was going to see Mr. Mellon about it.

I went to see Mr. Mellon, the superintendent of schools in Champaign, in his office. No one else was present. I related to him the conversation between Mrs. Taylor and myself, and told how Terry had come home from school crying; that I would not allow him to take religious education in the schools; that there was no special place for the children who did not take it and Terry had to sit in the music room by himself and was held up to ridicule and teasing because he did not take religious education. I [fol. 250] told him that as far as religion was concerned everyone taught their children about religion and could instruct them as they saw fit; that I did not see any reason why it should be brought into the public schools when there were churches where the religious education should be conducted. I expressed my belief that religious education such as this program was unconstitutional and con-

trary to the basic principle of separation of church and state. Mr. Mellon made no comment. I told him that I wanted my children's minds to be unfettered in any regard, open to scientific proof, that when they were old enough to be discerning themselves they could judge; that I did not want them indoctrinated when they were young with any creed, superstition or any belief in the miraculous.

I admitted that the teaching itself did not hurt Terry as long as at home we presented an open viewpoint for him, but I was going to keep him out of the class because I would not be one of those people that swell the ranks of the parents and sign up for religious education in the school. I told him that friends of ours personally feel that they have been ridiculed; it has come to where the child of parents who have not signed the card has not been approved. With the system of religious education in the public schools those children have come home and teased them and they wanted to take it, and then the parents have consented. I told him I was not going to have my child included in that count; that would be hypocrisy on my part, being bitterly opposed to letting myself or my child being taken into that count.

Mr. Mellon told me that he was neutral; that it was a system in operation at the time he took over, he had no [fol. 251] particular connection with it or responsibility in regard to it; that he had no protests regarding religious education in the schools; that there was no reason up to this point for him to have taken any notice of it. . . .

We discussed the merits of religious education in general and in the schools in particular, and he asked me if I was familiar with a book, I think by Thorndyke, in which there is some sort of a co-relation between religious education, good citizenship and morality and its influence on the community. He mentioned a chapter in the book on the Nature of the State, and he said there was very little if any co-relation between religious education, religious instruction, and good citizenship. I told Mr. Mellon that I thought it was an unfortunate thing in the public schools because it called attention to the differences in creeds, races, beliefs, ideas of children and their parents right there in the public school class room, the main democratic organization in this country, and right there those differences were brought out and emphasized before the children, the differences of religion in which there is an emotional quality. A very im-

portant pre[illegible]e is that the children are going to hear it at home and they have the feeling right there that some are going to become protestants, some Catholics, some Jewish, some atheists. Take a Jewish girl, for instance. She could be in that class room and associate with her fellow students and not even be questioned, and without the children ever knowing she was Jewish, or having any feeling whatsoever; but as soon as they let the children participate or perceive there is a difference then all at once she is out. That was one of the great hardships that resulted from religion being taught in the public schools; and the further good [fol. 252] reason for having that principle of the separation of the church and state.

I told him I did not believe it belonged in the public schools; that I was not going to complain any more there but that I was going right on and up, and I asked if he had any suggestion as to where I might begin, and he said I might prepare a letter and submit it to the school board. He told me that there had been wide-spread interest in the subject of released time for religious education in connection with the schools; that the Champaign plan had been satisfactory and they had numerous inquires from other communities regarding the set-up in Champaign; that as a result a letter was being prepared to be sent out to these people who requested information. He had not taken a count of whether they came from ministers, school teachers or parents but he said very often they came from clergymen.

I had another conversation with either Mr. Mellon or Miss Busey in the superintendent's office. She is his secretary or receptionist. In May I had a conversation with Mr. Mellon. Rev. Schug and Mr. Chapman were also present.

Mr. Franklin: I object to any further conversation. It is admitted that she made other objections and a demand on the superintendent.

The Court: We will hear the evidence subject to the objection.

The Witness (Continuing): Mr. Chapman asked Mr. Mellon how many teachers there were, what faiths they represented, and if any teacher of any belief could come and teach under the same conditions. Mr. Mellon said as far as he knew they could. Mr. Chapman asked if Jehovah's Witness could send a teacher into the public schools to instruct the children, and Mr. Mellon said so far as he

[fol. 253] knew they could. Mr. Mellon said he was not familiar with the teachings of Jehovah's Witnesses. Mr. Chapman asked if he knew they taught that it is wrong to salute the flag because they regard the flag as an image and they are taught not to bow down to an image but only to God, and therefore they forbid saluting the flag. Mr. Mellon said that he would not let Jehovah's Witnesses have a teacher in the public schools if the American Legion opposed their teaching because of that or any of their other beliefs.

Mr. Franklin: I move to strike this conversation.

The Court: It may stand subject to the objection.

The Witness (Continuing): I asked Mr. Mellon for a copy of the form letter which they were sending out in answer to the inquiries from other localities but was told it had just been made up and was sent to Rev. McDonald for approval before it was printed up to be sent out. I did not see it then and did not see it at this time.

Mr. Mellon offered to get the file of correspondence and material accumulated since the beginning of the religious education program. He brought it out and showed us some letters, very briefly.

I do not believe there was anything said with reference to sending material to Rev. McDonald except this particular letter.

Mr. Mellon stated that cards were handed out at the beginning of each semester to the children in the classes where religious education was included in the work, that the cards were collected and Miss Chapin had them, and she compiled the figures on attendance; that those records were sent to the superintendent of schools. She said sometimes the cards were mimeographed or printed in the same office; I don't know if she said in the school or by the school machine.

[fol. 254] On one occasion I stopped in the office for the list of members of the school board, and received it.

About the time of the last conversation Mr. Chapman, Mr. Schug and myself called on Mrs. Kelly and on Mrs. Huxtable. She is secretary of the school board. We saw her at her home.

Mr. Franklin: I object to conversations between individual members of the board who as such have no authority.

The Court: Ojection sustained.

Mr. Chapman: I offer to show that she called upon Mrs. Kelly, as a member of the school board and its secretary, and that Mrs. Kelly informed her that she did not favor any Mormon form of teaching in the schools, especially teaching polygamy.

Mr. Franklin: I object.

The Court: Sustained.

The Witness (Continuing): I do not recall right now any other conversations with any other teacher, employee or member of the school board with reference to religious education in the public schools of Champaign.

Q. Did Mrs. Taylor ever say anything to you about children complaining that Terry had kicked and slapped them and spit in their faces?

Mr. Franklin: Objection.

The Court: She may answer.

A. Mrs. Taylor told me that Terry was not being adjusted and he was not accepted too well in the class room.

Mr. Franklin: Objection. This conversation has been gone over step by step. Mrs. Taylor was his witness, and he cannot cross-examine as to whether to impeach Mrs. Taylor.

[fol. 255] The Court: The objection is sustained. The answer will be stricken.

Q. When Mrs. Taylor testified as to the children complaining that Terry had kicked and slapped them and spit in their faces, had the matter ever come to your attention before?

Mr. Franklin: Same objection.

The Court: Sustained. You are not permitted to ask an impeaching question.

The Witness (Continuing): I do not attend any church. I have never been a member of any church. Occasionally I attended Sunday school when I was a very small child. I was baptized in the Lutheran church and went to the Lutheran Sunday school when I was about 4 or 5 years old. Then I went to the Presbyterian Sunday school with my grandfather. He was a Presbyterian, and would stay for church and I would go to Sunday school. That was when I was between 6 and 8. I went to the Episcopalian Sunday school when I was about 10.

My children go to the Unitarian Sunday school. Terry occasionally goes to the Unitarian Church. He attended perhaps two months during last summer and spring. I have not made any study of religion. I have not taken any course in any theological seminary nor in any colleges or universities. I have never been particularly interested in religion.

Q. Have you ever joined any organization in opposition to religion?

Mr. Franklin: Objection. It is not direct examination.
The Court: She may answer.

A. I have not.

Q. Have you ever engaged in any activity in opposition to religion in the church?

[fol. 256] Mr. Franklin: Objection.
The Court: Sustained.

Q. Have you ever engaged in any activity in opposition to teaching religion in the homes of the people?

Mr. Franklin: Objection.
The Court: Sustained.

Q. Do you accept Miss Chapin's statement that Adam and Eve were the first man and woman as a true teaching?

Mr. Franklin: Objection.
The Court: She may answer.

Mr. Franklin: I object for the reason that there is no foundation laid here to show that the relator is a member of any recognized sect, society, organization, cult, creed or belief, that she embraces the belief of any such organization, doctrine or belief. I do not believe that there could be any question of relevancy unless in some way it is to be contended that her form of religion is interfered with. She cannot have a religion all by herself alone.

The Court: The evidence will be received subject to the objection.

A. I do not.

Q. Do you desire that doctrine or belief taught to your child while he is at the age of 9 or 10?

Mr. Franklin: Objection on the ground that the parents' desires with reference to the matter are not the con-

trolling factor with reference to what the child should himself be permitted to learn.

Mr. Peterson: Otherwise there would be no choice of form of religion for the child.

The Court: Objection overruled.

A. I object to that doctrine or belief being taught to Terry as a creed or dogma. As a story he is permitted to read anything.

[fol. 257] Mr. Franklin: We object to all this line of testimony.

The Court: It will be so understood.

The Witness (Continuing): As to Miss Chapin's testimony that Jesus was a man whose father was God and his mother a woman named Mary, I do not want Terry so instructed if it implies that it is something that should be taken upon faith. He may read it and he may reason it out in his mind. I do not want him taught that kind of a story as a true story.

Q. Miss Chapin testified that she teaches in her course in religious education in the public schools that human bodies will be resurrected after death. Do you want that taught to your child at the age of 10 years as a true thing.

Mr. Franklin: Objection.

The Court: Sustained. The evidence may go in subject to the objection. I do not think that this fairly reflects Miss Chapin's testimony about the matter.

(After the reporter read Miss Chapin's testimony the court changed its ruling and permitted the witness to answer the question.)

Mr. Franklin: I object to that question because it erroneously assumes that Miss Chapin's teaching was that matter of the resurrection as a true story or thing. She only said that she taught it by reading it from the Bible without any statement as to whether or not it was true or to be believed.

The Court: She may answer subject to the objection.

The Witness (Continuing): I do not want my children to be taught that as a true story. I do not want my children taught that a certain prophet by the name of Elijah went [fol. 258] up to Heaven in a chariot of fire from the earth. I myself do not accept as in accord with reason the beliefs

with reference to Jesus and Adam and Eve and the resurrection. So far as the chariot and the resurrection, that is not reasonable to me on the face of it. The story of Jesus having God for a father and a woman for a mother is not reasonable to me. The story of Adam and Eve being the first man and woman does not sound reasonable in line with my education.

I have no objection to my boy reading the Bible. As far as I know he did not read the Bible through, but he certainly had it from reading parts of it whenever he wanted to read. I gave Mrs. Janke permission to teach him the Bible in February, 1945.

Cross-examination.

By Mr. Franklin:

I first became acquainted with the doctrine of church and state in high school, where it was discussed in the social science class. I have had between thirty or forty hours of political science study since then in Cornell University. I have done extensive reading in the form of government and history of government, and especially the government of the United States. That was my main course in college. I do not have in mind now the name of that book or treatise on the separation of church and state. They were text books. I do not accept that doctrine as a tenet of religious belief. I had about a year of law study, international law, contracts, personal property and torts. I had a course in constitutional aspects and social problems in political science. My belief in the doctrine of the separation of church and state is one about which I feel very deeply. It does not influence my attitude towards religious education [fol. 259] and religious education in the public schools as it is conducted in School District No. 71. If the court decides that this is definitely within the boundaries of the constitutional limitations, definitely constitutional, I have no further objections.

I know that many children in the fourth, fifth, sixth, seventh, eighth and ninth grades in School District No. 71 do not take the religious education classes. I do not know the percentage. It may be approximately 80 per cent as you say. It may be that at least 20 per cent, as you say, of the pupils in the fourth, fifth and sixth grades throughout the system do not take the courses. It may be true that

those people have various and different reasons for non-participation. It may be true that not all of them fail to take the courses because of any religious unbelief. I do not admit that a child's non-participation in these classes discloses nothing whatever in regard to his religious belief or lack of it. I know of Jewish children who have failed to participate in the religious education courses because of non-belief in the New Testament.

Q. Do you know whether or not that child has been taking the course in the Jewish religion?

Mr. Chapman: Objection on the ground there is no evidence there is a class.

The Court: Objection overruled.

The Witness (Continuing): The child I have in mind is a boy in the grammar school in School District No. 71, fifth grade. I do not know how many of that class do not take the religious education courses in the school building.

Q. So you do not know whether that child's religious beliefs are pointed out by this non-participation in these classes?

Mr. Chapman: Objection.

[fol. 260] The Court: She may answer.

The Witness (Continuing): I do not think that is a just conclusion to draw from the previous question. I have no conclusive evidence as to whether that boy's religious belief as a Jew is pointed out by his non-participation in the class in religious education. For all I know there may be a half dozen other children in that class who do not take the religious education class.

Q. Say hypothetically, that there are other children in that class who do not take the religious education classes, in this case the Jewish lad's belief in the Jewish religion is not pointed out in any way by his non-participation in that class. Isn't that true?

Mr. Chapman: Objection.

The Court: Sustained.

Q. You simply know nothing about the situation which exists with reference to participation or non-participation in religious education classes in the fifth grade class to which you refer; isn't that true?

Mr. Chapman: Objection.

The Court: Overruled.

The Witness (Continuing): I don't know anything further as far as fifth grade is concerned. I do not know if the Jewish lad's belief in the Jewish religion is pointed out in any way by his not participating in this class. I have just his family's opinion. I have no conclusive evidence. I have not conducted a thorough survey and I do not know of any other children who do not believe in God in School District No. 71 and who have because of that failed to participate in the religious education classes in the public schools. I do not know that when Terry failed to participate in these classes he was not required to disclose any reason for his [fol. 261] non-participation. I was not there. I do know that participation is voluntary, based on the parents signing a request on that card.

My mother was brought up in the Lutheran Church. I do not know if she was a member or attended regularly. I had the benefit of her tutelage and care during my younger years. As far back as my memory runs in childhood, I was going to church and Sunday school whenever I wanted to. I was probably 4 or 5 when I first attended Sunday school. I went for a few Sundays in the year. There was nothing in the Lutheran Sunday School. In the Presbyterian they gave us little cards reciting Bible verses. I may have attended more than half a dozen times. When I went to the Presbyterian Sunday school I was between 6 and 8. I went with my grandfather who was an elder of the church. I assume he believed in God. I never discussed it with him. I think my mother believed in God. I do not know about my father. I do not think he attended any church. I attended the Presbyterian Sunday school regularly for about a year.

Q. Do you remember any of the teachings that you received in the Presbyterian Sunday school?

A. Not especially.

Mr. Chapman: Objection.

The Court: Overruled.

The Witness (Continuing): It is so long ago, it is so hazy in my mind that I do not recall if I studied about God in the Sunday school at that time. It must have been in some way incorporated, perhaps in the Bible verses. I stopped going to the Presbyterian Sunday school when I was about 8. I did not go to Sunday school for some time thereafter until

I became friendly with a teacher at my school who asked me to go to the Episcopal Sunday school. I went there about from 6 months to a year when I was about 10. I do not [fol. 262] remember any of the prayers. We probably learned about God there. After that I did not go to any other church, but attended occasionally. I used to go to chapel occasionally at Cornell University.

Q. Were you still toying then with the idea of believing in God?

Mr. Chapman: Objection.
The Court: Sustained.

Q. Did you go there to worship God?

Mr. Chapman: Objection.
The Court: She may answer.
The Witness (Continuing): I had no convictions whatsoever; at that time I was 19. In my childhood at home I did not hear the doctrines of teachings of the belief in God. I do not know whether at that time my father espoused the same beliefs with reference to God and religion as he espoused here on the witness stand. If he told me about it it made no impression. I can't recall when I went to church after I left Cornell.

Q. When you were married in February, 1934, were you married by a minister in a religious service or by a civil officer?

Mr. Chapman: Objection.
The Court: She may answer.
The Witness (Continuing): We were married by a judge in Chicago. As far as I can recall no form of religion or recognition of God was included in that service.

Q. You did not go before a judge in order to escape a religious form of marriage service?

Mr. Chapman: Objection.
The Court: Sustained.

Q. Did you at any time have any scruples of conscience [fol. 263] against participating in a religious service or form of marriage on February 6, 1934?

Mr. Chapman: Objection. There is no evidence here with reference to her participation, only to her children.

The Court: Objection overruled.

The Witness (Continuing): I felt that the civil ceremony was as legal and binding and not subject to conflict with anything that I might believe. I am not a member of the Free Thinkers Society of Rochester or of any Free Thinkers Society anywhere.

Q. Do you at this time believe that there is no Supreme Being in the world?

Mr. Chapman: Objection.

The Court: Overruled.

A. I would have to ask you to tell me what you mean by Supreme Being.

Q. Do you embrace the opinions of your father, Mr. Cromwell, as expressed in "Rationalism v. Religious Education in the Public Schools"?

Mr. Chapman: Objection.

The Court: Overruled.

The Witness (Continuing): I cannot answer yes or no.

I remember signing a petition for mandamus. I acquainted myself with the material in the petition. What was in there was with my knowledge and approval. I knew that it was a statement that I adhered to the school of thought known as Rationalism, including atheism. I am not a believer in any religious creed or doctrine and do not accept that part of the Bible as true where it is not in accord with reason. I knew that it contained a statement that my views and understanding concerning religion are set forth in the publication entitled "Rationalism v. Religious Edu-[fol. 264] cation in the Public Schools," written by my father, Arthur G. Cromwell. It is still true today that those views are my views. I have not changed my mind since this proceeding was started. That was a correct statement when I signed the petition. I believed it the way I interpreted it. At that time I took an oath that the facts set forth in the petition were true. I do not remember in what form the oath was administered. I am not sure that an oath was administered. I do not know.

Q. Did you at the time have conscientious scruples against taking oaths?

Mr. Chapman: Objection.

The Court: Overruled.

The Witness (Continuing): I would prefer to take an affirmation. If the oath had been by the ever-living God I am sure I would have said something about it. I do not remember whether I affirmed on that occasion.

Mr. Franklin: I move to strike the verification from the petition for mandamus in this case.

The Court: The motion will be denied.

Q. Did you as recently as September 10, 1945, which was Monday of this week, sign your name to the reply to the intervening petition in this case?

A. Yes, sir.

Mr. Chapman: Objection to the whole line of questions. If there was anything wrong with the petition or the verification he should have said so when he filed his answer.

The Court: Objection overruled.

Q. Where did you sign this?

Mr. Chapman: Same objection with reference to the reply.

The Witness (Continuing): I signed it down stairs in the [fol. 265] Circuit Court Clerk's office. Hallie Snyder was the deputy clerk who took my signature. As the instrument recites, I subscribed and swore to it. I did it by raising my right hand. I do not believe Mrs. Snyder repeated the oath and used the words everlasting God. I am convinced she did not. I did not ask her to administer any different form of oath. She did not say anything about the form.

Mr. Franklin: We move to strike the verification from the reply to the intervening petition. Certain advantages are given to litigants by swearing to the pleadings. Whether they do or do not is not a matter of election to them. If they seek those advantages they may do so by swearing to the pleading, but in this instance it turns out that there has been no swearing by anything that binds the conscience.

The Court: From her testimony it appears she did whatever was required of her by Mrs. Snyder. The motion to strike the pleadings will be denied.

Q. Did you have any conscientious scruples on September 10, 1945, against taking an oath to the ever living God?

Mr. Chapman: Objection as irrelevant and immaterial.

The Court: Overruled.

A. I do not know if the oath necessarily implies to the everlasting God. As far as that is concerned, I have no scruples as far as being obliged to tell the truth is implied with the help of Almighty God or anything of that nature, I would have scruples as far as I am concerned, I will tell the truth on my own oath.

Mr. Franklin: I move to strike the answer.

The Court: It may stand with the rest of her testimony.

Q. Do we understand you to say that on September 10, [fol. 266] 1945, you had no conscientious scruples against taking an oath to the everlasting God?

Mr. Chapman: Objection.

The Court: Overruled.

The Witness (Continuing): I had scruples as far as saying or swearing to the everlasting God, when I had no proof. I do not believe in the everlasting God. It is not offensive to me to swear by the everlasting God. Had I understood that I was affirming by the everlasting God I would have asked for any other form that could be given and equally satisfactory to the court, omitting it. I did not do so at that time.

Q. When was it that you first made up your mind that you did not believe in God?

Mr. Chapman: Objection.

The Court: Overruled.

The Witness (Continuing): I could never set a time. I always had the form of belief as I reasoned it out in my own mind.

Q. When did you make up your mind that you did not believe in God, whom you say now you do not believe in?

A. When did I say I did not believe in God?

Q. Do you subscribe to the references in this document "Rationalism v. Religious Education in the Public Schools," to your father's belief as that of an atheist?

Mr. Chapman: Objection, as not covered by direct examination.

The Court: Objection overruled.

A. Does it say that exactly?

Q. Do you contend that you are or are not an atheist?

Mr. Chapman: Objection.

The Court: Overruled.

[fol. 267] A. I am a Rationalist. I subscribe to the expressions in the second paragraph of this petition that "The relator adheres to the school of thought known as Rationalism including atheism."

Q. You do believe as atheists believe, do you not?

A. I believe as a rationalist.

Mr. Chapman: I object to the question and move the answer be stricken.

The Court: Objection overruled and motion denied.

The Witness (Continuing): I adhere to the school of thought known as Rationalism including atheism but I believe as a Rationalist. An atheist is a Rationalist. It has never been in my mind that Rationalism and atheism are equal terms. They are not synonymous, they are different. I am a Rationalist. When I made that statement in the petition that I adhered to the school of thought known as Rationalism including atheism, that was true.

I am a Rationalist. I am an atheist as far as believing in my own mind that there is no God. As a Rationalist I have not proved there is a God in my mind. I will not deny that there is a God in the mind of any person that believes in God, because it is a mental concept. In my mind I have not accepted a belief in God. I have no proof.

I have on occasion had behavior problems in trying to have Terry adjust himself to the other children. Terry has been in fights. I did not know before yesterday that he had a practice of spitting in the faces of other children. I heard him say on the stand that he spit in the faces of other children on occasion, not a practice. I consider that a behavior problem in which I should be interested vitally as a mother. That was a behavior problem that came up with all the rest that may be expected from any normal [fol. 268] boy. I did not think his behavior in that matter is normal, therefore I thought seriously when he did not adjust himself very easily to society. It was first brought to my attention in the third grade. The teacher suggested a remedy, which I applied.

Q. Have you been working on this problem, his failure to work with other children, vigorously and conscientiously and carefully since it was called to your attention?

Mr. Chapman: Objection.

The Court: Overruled.

The Witness (Continuing): I never had to work at it vigorously because it was not much of a problem. I did what the teacher suggested.

I would say I had almost the same problem during his fourth grade as in third. It was merely that he did not do his work properly. So far as adjustment, I was really concerned.

In the fourth grade at the South Side school he used the name Terry. At the end of the fourth grade I transferred him to the Dr. Howard school because the South Side school was so crowded and the Dr. Howard school was just about as near. I also had another boy entering second grade who had been at the South Side school for the first grade and that was over-crowded, and I wanted the boys to go to the same school.

I think I accompanied the children to the Dr. Howard school on registration day when Terry entered fifth grade. I had a conversation with Mrs. Taylor there. I told her substantially that Terry had not gotten along with the other children in South Side school, was behind in his work, and I wanted to transfer him for those reasons. Those considerations were considered. I did not like the [fol. 269] idea of Terry's being called James in the new school. Terry had disliked the idea of being called by his second name. He will probably get over it. It was all right with me. I could not cooperate by doing it at home. I could not remember.

He came home a couple of times with his clothes soiled or a knot on the back of his head, or the spokes of his bicycle broken or bent because his bicycle had been damaged from school. It was aware of those instances. He never tells about what hurts him. He keeps it to himself.

I have no objection to the teaching of the content of the Bible without any effort being made to make the child believe that it is the literal truth or the word of God or anything inviting the idea. It should be a mere reference book. I do not object to the repetition of the Lord's Prayer in my presence or that of my children.

I believe that pray tends to fortify one's belief in God. Notwithstanding that, I have not objected to my children being present in the class room in which that is

part of the opening exercise every day. I have never inquired of Terry what they did.

As far as religious education in the public schools, it would not have a bad effect upon Terry. I do not know it would bother him one way or the other. I did not know it until in court.

Q. Didn't you hear your son yesterday say he came home and told you of this?

Mr. Chapman: Objection.

The Court: Sustained.

A. If he told it yesterday that is when I heard it in court for the first time.

Q. Did you not hear him say that he came home and told you about it?

[fol. 270] Mr. Chapman: Objection.

The Court: Sustained.

Q. Then you had known it before today?

Mr. Chapman: Objection.

The Court: Sustained.

The Witness (Continuing): When he came home he told me of the Bible stories in the demonstration school in the University of Illinois summer school; that was at a different school. I think he said something, in fact, he probably told me. That did not bother me particularly. The idea of the school was for the purpose of showing public school teachers model methods of teaching religion. I registered my child in that class. It is not exactly true that I sent his application to be preferred there over others, knowing that only about twenty applications would be accepted among the hundreds turned in. I had tried several months before to ascertain if he would be in the group, which just planned to have the fifth and sixth grade level. It was not determined. So I went a couple of other times. As soon as it was determined we would be able to put in the application, because I was very desirous of Terry going. Then when it came to the time that they did receive the applications I went over. In the meantime I had talked to Mrs. Janke about him. She was very anxious also that Terry take the course. She is a psychiatrist, in charge of the counselors. She had been helping me with Terry since the third grade.

When it came to choosing a private school in which to put Ariel I made no investigation whether the Lord's Prayer was repeated there, nor did I make any effort to determine whether religious hymns were sung there. I do not know whether they are. I have no particular objection to Ariel attending a private school in which the Lord's [fol. 271] Prayer is repeated or prayed and hymns are sung. My real objection to these courses is because of my belief and my interpretation of the expression of the separation of church and state and the indoctrination of young children. I am more concerned with the separation of church and state. It is true that I have placed my children twice since this suit was started in classes where the Lord's Prayer was repeated and religious hymns sung without making any investigation to see whether or not that was the case, but the conclusions that you drew are not true, that is that I sent my children without investigation. I do not believe in your conclusion that it was because I had so little thought that I did not check. It is not true that I was too busy.

I do not believe in what the Bible teaches unless it sounds reasonable to me in the light of my own education.

Q. Do you feel that your education has been better on the average than others who have been able to participate in the educational system which the United States provided?

Mr. Chapman: Objection.
The Court: Sustained.

Q. Is there something special about your educational background that makes you feel better qualified to arrive at what is reasonable or rational than there is in the education of other people who have had college education?

Mr. Chapman: Objection.
The Court: Sustained.

Q. What part of your education is it to which you attribute your testimony?

Mr. Chapman: Objection.
The Court: Sustained.

[fol. 272] Q. What part of your education is it to which you attribute your testimony.

A. I do not.

Mr. Chapman: Objection.

Mr. Peterson: She says that is the origin of it.

The Court: Objection overruled.

The Witness (Continuing): My Rationalism is the result of being quite unfettered as to thought and belief. I have had a great deal of liberty. I chose my university courses. I have been unfettered as a child in my own home, in working in cooperation with churches and I have been told I was always free to take the views as they came to me. I had changed very frequently. Religion has hardly been given a thought but I think that has not been of prime importance. I have not had the usual religious education.

Q. Do you believe it is easier for one to become an atheist who does not have religious training than it is for one who does?

Mr. Chapman: Objection.

The Court: Overruled.

A. I think if a child has been taught right along, not indoctrinated with the idea that there is a Supreme Being, that the Bible is the word of God and that there are certain elements of fear instilled by these doctrines, whatever the different belief or church, I think it is harder to start with an unprejudiced mind.

Q. Do you mean it is easier to learn atheism if you have no religion in your head or no religious teaching?

Mr. Chapman: Objection.

The Court: Sustained.

The Witness (Continuing): I think that a well-educated person should be free to chose his own religion. That is [fol. 273] why for my children I desire that they have full information on religion and atheism. I will not have them indoctrinated on atheism and I do not want anything else indoctrinated. So far as religious belief, when they study the Bible as a book, without a great secular background, if they go to Sunday school, their belief in God has to come without the immediate associating with religion in their minds; they know about it.

The kind of religious education and instruction which the children receive is not sufficient. That is why I send them to the Unitarian Sunday school.

Q. What treatment does religion receive in this form which you are seeking, as you say, to keep the minds of

the children open? Do you in fact attempt to keep the minds of your children open on religion or do you ridicule it?

Mr. Chapman: Objection.

The Court: Overruled.

The Witness (Continuing): I never consciously ridiculed religion since this case has come up, although we have tried not to cloud our minds, confuse our thoughts too much, get them involved, never have heard it at my home. The pendency of this case has not made an issue in my family, the issue was raised before that.

During Terry's second semester of the fourth year of his schooling I requested that he be permitted to be given the religious education courses.

Q. Is it not true that at that time you told his teacher you doubted the wisdom of this youngster entering those classes because you had ridiculed the Bible stories at home and he might disrupt the class?

Mr. Chapman: Objection.

The Court: Overruled.

[fol. 274] The Witness (Continuing): I do not believe that was the conversation. I am not sure. I don't admit I had ridiculed the stories. The boys have heard it, unfortunately, but not from me here. I imagine they heard from what Terry told his grandfather.

Cross-examination.

By Mr. Peterson:

Q. Is it your thought that anything that the government or any division of the government does to sustain the idea that there is a God is illegal?

Mr. Chapman: Objection.

The Court: Sustained. It has been covered.

The Witness (Continuing): I have never brought to the attention of my children the inscription "In God We Trust" on coins nor have they brought it to mine.

Q. Is it your contention in doing this the government is violating the Constitution?

Mr. Chapman: Objection.

The Court: She may answer.

A. I do not profess to be an authority on constitutional law. I have no way of knowing if that is an infringement. I know this much: In the Constitution of the United States no place does the word "God" appear.

I have read the Constitution of the United States and the Declaration of Independence.

The constitution of Illinois has a reference to God.

Q. Is it your contention that in placing a placard or a pillar in this very building announcing certain churches and giving their location that that is an aid to the church?

Mr. Chapman: Objection.

The Court: Sustained.

[fol. 275] Cross-examination (Resumed).

By Mr. Franklin:

The father of James Terry is still living in the home as husband and father.

Redirect examination.

By Mr. Chapman:

I have never made any special study of religion. Before this matter came up I have never given religious education in the schools much thought. I have been interested in many other things more than in religion.

Q. Why did you give Terry permission to take religious education during the last half of the fourth year?

Mr. Franklin: Objection as not a matter in issue.

The Court: Overruled.

The Witness (Continuing): In permitting Terry to take religion during the last half of the fourth year I took into consideration that he had come home and had asked me to be allowed to take it. I did not approve of it or I would have done it in the first semester.

This summer the school he attended at the University was a combination class of fifth and sixth graders under the supervision of Mr. Smith. It was in conjunction with the course given by Dr. Luther for the University of Illinois. I do not know whether or not any private teachers came in there to teach religion.

Recross-examination.

By Mr. Franklin:

I do not think there was any difference in the way he got along in the fourth grade after he entered the religious education class.

[fol. 276] Mrs. Ralph L. Kelley, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Mrs. R. L. Kelley, 601 South Willis Avenue, Champaign. I am a housewife and a member of the Champaign School Board for District 71. I was elected to that position. As secretary I sign checks with the president. The clerk of the school board keeps the records. I do not have charge of any records. I am a member of the instructional committee. The committee works with the superintendent in selecting the instructors and instructional duties. The superintendent, with our approval, selects the teachers. I have access to the records of the school board. They are here.

The clerk keeps these books under the supervision of the superintendent; she is his assistant. He is under the direct supervision of the entire school board, of which I am a member.

I have with me the school board records with reference to religious education. I am familiar with these records.

I cannot find in these records any record of any money having been paid to the school board for the mimeographing of the cards for use in connection with religious education in the public schools. I have all the receipts and expenditures in these matters.

I do not know how the cards were used in religious education. Nobody under my supervision on the school board had anything to do with preparing or distributing the cards. That was not our problem. I do not know whether Mr. Mellon ever was paid in any way for the distribution of [fol. 277] the cards. I have never given attention to the

courses in religious education in the public schools in Champaign. I have never attended any of those classes. I never made any inquiry into what way or into what was being taught.

M. H. Adams, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is M. H. Adams; 609½ South State, Champaign. I sell insurance. I have had five children attending the public schools in Champaign, none at the present time; one within the last five years; my son.

The matter of religious education in the public schools of Champaign came to my attention five or six years ago, at about the time it was first established. I read about it in the papers; tried to find out who was back of it but did not seem to be able to find anybody who knew much about it. I talked to Dr. Dallenbach, president of the school board at that time. I mentioned religious education to him. Only we two were present.

Mr. Franklin: Objection to testimony of the conversation.

The Court: We will hear it subject to the objection. Then I will rule upon its competency.

The Witness (Continuing): I asked him about the subjects being taught in the religious education, and he told me he did not know very much about it himself; that it had been turned over to V. L. Nickell, superintendent. I saw Mr. Nickell in his office, no one else present. I told him I was bitterly against anything of the kind being taught in the public schools, and he said they were just starting and did not know how it would work out, or anything of the kind—maybe it would not.

[fol. 278] Mr. Franklin: I move to strike that.

The Court: Let it stand.

Q. Do you have or did you have any unusual experience in your home in regard to that?

Mr. Franklin: Objection.

The Court: Overruled. If it is with reference to some child or children in his home he may answer.

The Witness(Continuing): My boy brought some card home. We did not sign it and he took it back to school. A few days later he brought it back home. When he brought the card home I talked with him about it.

Q. Did you notice anything unusual about him?
A. Well, he said—

Mr. Franklin: Objection to what was said.
The Court: He may answer.

A. He said the teacher seemed to think he was lying to her and he did not bring the card home or we would have signed it.

Mr. Franklin: I move to strike.
The Court: It will be stricken. What the boy said the teacher said is not binding on the school board.
The Witness (Continuing): I did not sign the card the second time he brought it home; he took it back to the school. Nothing further was done about it that time. He brought the card back the next year. I did not sign it. I refused to sign the card and he took it back each time.

Q. Was the boy pleased with your failure to sign that?

Mr. Franklin: Objection.
The Court: Sustained.
The Witness(Continuing): My other children went to the school before this was started.

[fol. 279] My son's name is Wallace Adams. He was 18 in April. He is now in the Army. The conversations which I referred to all took place without any third person being present.

PHILIP SCHUG, a witness on behalf of relator, having made affirmation in due form in lieu of being sworn, testified as follows:

Direct examination.

By Mr. Chapman:

I am Philip Schug, 1209 West Oregon, Urbana. I am a minister of the Unitarian Church in Urbana, Illinois, and have been for almost two years. I know Terry McCollum.

He attends Sunday school at my church. His mother does not, although she brings the boy and I presume takes him home. The other two boys come.

I am familiar with the doctrines and teachings of the Unitarian church. Inasmuch as every Unitarian has the right to think as he pleases it is difficult or impossible to answer whether the teaching that Adam and Eve were the first man and woman are in conformity with the teaching and doctrines of the Unitarian Church, but knowing Unitarians as I do I would assume there were some that actually believe that, or perhaps a small majority.

Mr. Franklin: Objection.

The Court: Sustained as to the assumption.

The Witness (Continuing): As far as my knowledge of them goes the great majority do not accept it in that form. I do not know of any who did accept as truth the teaching that prophets once lived who could foretell the future. I [fol. 280] do not know of anyone who teaches that or makes it a practice in the Unitarian Church. The teaching that Elijah went to Heaven in a chariot of fire is accepted as a story that is in the Bible, not as a true fact.

Q. One of the religious education teachers here said that she taught the children that Heaven was in the sky.

Mr. Franklin: There has been no such testimony.

The Court: Objection sustained.

Q. Does the Unitarian Church in its doctrines, teachings or belief teach a connection between Heaven and the sky?

Mr. Franklin: Objection, as based on the assumption that there were teachings common to all the Unitarians, but this witness has said that each has the right to think as he sees fit.

The Court: I will permit him to answer.

The Witness (Continuing): From my knowledge and understanding of Unitarianism and the Unitarians whom I know there is not, to my knowledge, any teaching in any connection between Heaven and the sky. I do not know of any Unitarians who accept the story that Jesus was the son of God as his father and a woman as his mother as in conformity with their belief. I do not know of any who accept the story that Jesus died and came back to life again in the human body. I do not know of any who accept the story that people who died come to life again as human

beings in a resurrection. I do not know of anyone who accepts that as being true.

The prevailing view among Unitarians is that God is some spirit, a force or thing or agency that lies behind the universe. There are other views that are widely accepted in the church. A large minority of the church take the view [fol. 281] that the entire question is outside of the scope of human experience, and they hold no opinion as to what he is or where he is or who he is or if there is a God. The majority view in my church does not speak of the King James version of the Bible as the Word of God, nor does the minority so speak of it. I seriously doubt that Unitarians speak of it as Holy Scripture.

Cross-examination.

By Mr. Peterson:

The title "Reverend", by which I am addressed, is a conventional title given to ministers of various churches, not necessarily ministers of the gospel. I took my theological course at the Evangelical Theological Seminary in Naperville, Illinois, and the Chicago Theological Seminary. I have been in the court room for several days and am interested in the result of this law suit. I came out of school in 1942. I am 31 years old. During the year and a half between my leaving school and taking up the ministry I studied psychiatric training in the Elgin State Hospital for mentally deficient. This was my first parish.

I am not sure I can answer your question as to whether I believe in a God. I recognize the relationships which are called God by other people. I do not give any credence to the idea that there is a personal God or anything that seems to be personal behind the universe. When I think of the term God I think of it as a term which is used by many in the same way I would use the term conscience or super ego.

When other people talk of God I have the working definition of what they are saying. Without evidence I would not wish to make a conclusion or an assumption as to whether there is a God. I only believe if it is susceptible of demonstration which I consider in keeping with the very best [fol. 282] scientific procedure of the day. In the Sunday school that I teach, the children are taught the various religions, ideas and theories insofar as we are able to,

taking into account a good many of them, from many periods, and the various cultures, and they also are taught the modern theories in this same respect. They are taught there are people who believe spirits exist and that there are people who believe spirits don't exist. Insofar as I am able to on these controversial questions I teach the positive and the negative; I try to teach a number of varied opinions, and try to cover the entire gamut, insofar as I am able to. Insofar as teaching the Bible stories, that is difficult because I am not so sure that they are always from the Bible. I read them from other written literature, literature written for children, publications from regular publishing houses; and we also follow them in the Bible, in the Koran, and other scripture of various cultures. In these lessons we refer to the alleged existence of Christ, to the creation of the earth as they are in the Bible. Right now we are teaching with reference to the creation of the earth, as they are in the Bible, and we are going into many different stories which are read to the children for the context, and we go into all of those stories that we are able to, and we get the children's opinions, asking their understanding, and they tell some they have read. The youngest group that are taking this kind of work would be about five or six years old. We do not give them what they could not understand. We have work for all of them. For the most part it is not based on Biblical stories. The literature in that class for the most part is based upon Biblical stories and stories from the scriptures of various cultures. The seven and eight year old class gets material that is based on Biblical stories, in addition to which they sing hymns. They sing sacred [fol. 283] hymns and also hymns not considered very sacred by some folks. They do not learn the Lord's Prayer. They learn the Ten Commandments only insofar as we expect them to know what they are, or doxologies, or other sections of law from various cults. We study the Ten Commandments.

The church school is one that I instituted at the beginning of the semester. Up until now we have not referred to the 23d Psalm; as I understand it the 23d Psalm is studied along with some other psalms of the church school. I do not know if it will continue.

I have not stated that I believe that there is some controlling power in the universe commonly referred to as God. It is not correct to state it that way.

There are some in my church who would so state it. A definition for people who take this position is agnostics. We have many such and we have some non-believers. We would probably have some atheists, and some that are commonly known as Christians by their own definition. We allow perfect freedom in that respect. My definition of a Christian is a person who considers Him as his Lord. There are a number of the people who feel that the word Christian has considerable value, social value, religious value, and they like to apply it to themselves. That is without acknowledging that there was a Christ, except as it is the conception in the minds of some people. I do not say that none of them call themselves Christians because they believe that there was a Christ, and I would also say that the ideas that surround what they call the word Christ, the spiritual or religious values are also ideals which are accepted by these people, and for that reason they use the term. That ideal is based on the teachings of a man called Jesus. I prefer not to use the term Christ.

[fol. 284] Terry McCollum's reference to this "bunch of words" that he learned there was to certain poems which are taken from various sources, scriptures of various cultures, from modern day writers, such as psychologists, psychiatrists, anthropologists, and any who write in an ethical or religious vein.

If any prayers are said in my church they are said by members or attendants without my knowledge. I do not bring or have any said in my church. I do not say prayers there.

Redirect examination.

By Mr. Chapman:

I do not teach that Jesus was more divine than anybody else. I do not ask the children to accept anything on faith. I should tell the children carefully that these are basic assumptions which they are privileged to honor, and as we get around in the world we must be continually questioned and challenged, as we develop and learn. I teach the children to challenge the Bible as to truth. I do not teach them that there is any teaching or theory or doctrine that they cannot challenge.

I teach about witches in connection with spirits. I teach about the birth of Jesus and I teach about Santa Claus.

The story comes on quite naturally as another folk tale that people repeat.

Recross-examination.

By Mr. Franklin:

In regard to the stories of Santa Claus and Jesus Christ, I consider the folk tales in two different categories in this respect. The Santa Claus story is not as deeply tinged with religious feeling and not as deeply implanted in the cultures as is the story concerning the birth of Jesus. That would naturally be considered in the minds of people as of [fol. 285] different value. Otherwise I consider them as just both stories that are quite meaningful to people. I cannot answer yes or no the question whether it is about equal evidence of the existence of Jesus Christ as there is a Santa Claus.

Redirect examination.

By Mr. Chapman:

It is difficult to answer yes or no because I see considerable evidence of the existence of a man named Jesus as we find it in the scriptures, the Bible, and do not deny such a person existed. I find no evidence of the personal or impersonal existence of a Santa Claus except in the imaginations of certain people.

Recross examination.

By Mr. Peterson.

I found evidence which contributed to the myth of Santa Claus, but not any that there had been a Santa Claus.

Mae Chapin, recalled as a witness on behalf of relator, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Chapman:

The card in evidence is one of the cards that were given to the sixth grade pupils this year and were printed for my own use. These are printed for the purpose of distributing

to the sixth grade pupils for entrance into the educational course. The others I printed myself and paid for myself. That card has been printed under my supervision. This was mimeographed about two weeks ago, I think, in my own house on my mimeograph. The sixth grade and afterward had been done by the office of Mr. Mellon, the superintend-
[fol. 286] ent, and the school board was paid for the work done in the office.

Relator's Exhibit 3 for identifiaction is a document which I have never seen before.

In May, 1945, the board of education printed cards. The school board mimeographed the cards for me in May, 1945, and was paid for the mimeographing by me for the Council on Religious Education. I do not know what arrangement was made before that.

The child who took religious education had a separate card signed each year. When Miss Bash testified here that she did not sign a card this year that is explained by the fact that in junior high school the pupils make out their schedules and take them to their parents for approval. If religious education is on the schedule that means the parents approve, so when they go from sixth grade to seventh grade the cards are given to them, and if they are in junior high school and religious education appears on their schedule, if they sign up for it that means the parents approve when they approve the schedule. My understanding is that the students in junior high school take their schedules home to their parents; they place their written approval on it. I do not know what becomes of the schedule after they bring it back to school. It is not turned over to me.

The pupils usually pay 25 cents a semester to me for the books or material that they use, both in junior high school and in the grade schools. For that we give them a manila covered copy book, an envelope in which to place their material, manila folders, and pictures and other material. Sometimes we give them books or mimeographed material and text books.

This material we obtain from various places, the pictures from Chicago, the envelopes and manila folders we usually
[fol. 287] buy locally from private dealers. The pictures may be of St. Joseph or others.

After I obtain the 25 cents I put it into the account of religious education. I keep the fund and use it for material.

I would say the attendance in the fourth grade religious education class is larger than in the junior high school. I think the attendance in the fourth, fifth and sixth grades is almost level. There is no big variation. We do not have a large proportion attending the seventh grade who do not attend in sixth or a larger proportion in eighth grade than in seventh.

The fees are collected from the students who take the Catholic course and are turned over to the Catholic father. I collect in the junior high, not in the grades. I do not think I have collected any fees from the Jewish students this year. I turn the names of Jewish pupils over to Rabbi Silverman. Right now there is no class of Jewish students, nor last year. I do not remember if they taught one the year before, but they did the year before that. The registration cards for this year are not all in. When we had the Jewish class it was taught by a young woman from the University.

In the junior high the attendance list is in the office. If any pupil is absent we turn in a slip just like any teacher would to the superintendent's office. The slip is a piece of paper with a number of hours in the school day and a square, and the teacher of the particular room for the particular hour records the absentees. It has their names and the grade and the section to which they belong. It is the same sheet that the geography and history teachers and all the other teachers use, and is furnished by the school. I [fol. 288] keep my own record of absent pupils in my grade book. I have a list of pupils that take my class. I obtain the names from the cards. In the junior high school I obtain them from the principal's office just like any other class.

Cross-examination.

By Mr. Rall:

The seventh, eighth and ninth grades are in the junior high school.

Cross-examination.

By Mr. Franklin:

I do not believe there are many Jewish children enrolled in our public schools. Where they do not have Jewish classes it is for lack of members to support the class.

Q. What is the reason that children do not participate in the religious education classes as fully in the junior high school as they do in the earlier grades?

Mr. Chapman: Objection, as calling for a conclusion.

The Court: She may answer.

The Witness (Continuing): One reason is because of schedule difficulties. Several girls and boys have come to me and stated they wanted it and had signed up for it, but the schedule made it impossible for them to take it because we fit into the schedule whatever the hour happens to be. If you have a set class for a set hour you cannot take it. Another reason is that some of the pupils have had it in the fifth and sixth grades, perhaps, and they do not feel that they have the time to continue it. With some pupils perhaps it is lack of interest. Perhaps the parents of some feel they would rather have them do something else with the [fol. 289] time. I have not heard all of those reasons assigned by pupils in the public schools for not attending religious education classes but I have heard some of them. I have not heard of religious scruples given as a reason for not participating by any other than James Terry McCollum and his mother. It has not come to my knowledge that failure to participate in these classes points out any religious difference between those who participate and those who do not.

Herbert L. Miller, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Herbert L. Miller, 104 North State Street, Champaign. I am an ordained minister and affiliated with the Episcopal Church in Champaign. I am president of the Council on Religious Education since June. I was elected at a regular meeting of the council, which is made up of representatives, both lay and clerical, of various churches. It is my duty to preside at the monthly meetings of the council and to have a general knowledge of the working of the system. I have nothing to do with the employment of teachers; the personnel committee attends to that.

I have been a member of the council for several years and have been on committees but have held no other offices. I was on the Curriculum Committee in 1941 or 1942. That committee would meet and we would go over the materials that were submitted and chose material for the year. With me on that committee were Mrs. L. E. Workman and Mrs. Dean. Mrs. Workman was affiliated with the Congregational Church. I do not know Mrs. Dean's affiliation. I never made inquiry. I met her when these courses started. [fol. 290] The committee would meet at the beginning of the year. I have no idea with what church she was affiliated. It never came to my attention. I imagine she is a Protestant because I do not select the material for the Catholic classes or help them in their selection. In all the time we were on the Curriculum Committee we selected material only for the courses offered the Protestant children, so I presume she is a Protestant, or so classed herself.

The materials for teaching would be displayed on the table at these committee meetings and we selected the materials to be used. That was five years ago, and I do not remember what materials we selected. We took into consideration all the material that was there, accumulated from several sources by several people. It was general religious matter accepted by the great Christian church throughout the world, that is, the general run of Christian churches which are in agreement on fundamentals. I cannot name them; there are over 200. That includes the Catholic church. We did not see their material because it is for them to select their own material. We selected for this group as Protestants.

I doubt that we had any material there furnished by the Free Thinkers. I do not know if we had any furnished by the Christian Science; probably. We did not have some from all the great churches. I do not know whether we had any furnished by Jehovah's Witnesses or the Mormons. I am not sure that I would include the Mormons among the great religious denominations, possibly; I said they were all great.

If the court ordered the school board to prohibit the teaching of religious education in the schools that would not be of particular concern to me, the course would go on anyway, regardless of where they were taught. I would [fol. 291] be concerned if the teaching were discontinued in the schools. I am interested in maintaining these classes

in the public schools. I do not recall whether we took into consideration any literature furnished by the Seventh Day Adventists. It was likely all Protestant material. I do not recall selecting any that was not. I don't recall a Koran there or any books on Mormon. If there had been any I would probably recall it. There might be a book on Mormon in the public schools of Champaign as a text book. I doubt that Miss Chapin in mentioning the Koran meant that she taught from it. There was no book on Mormon. I have a general idea of what is being taught in the general religious course. Mormon is not being used as a text book. Such a book might be used as a reference but it is probably not being used. Nor is Zoroastrian or Mohammedan. Buddhism may be referred to from time to time. Shintoism is probably not likely.

Cross-examination.

By Mr. Franklin:

The curriculum commitee has had the policy of having churches bring in any material being used, and to prevent any material being used that would bring up controversies or difficulties. The things that are selected for our courses are what is acceptable to the great mass of Christians. While we served on the curriculum committee we did not select for teaching any doctrinal material or teach particular beliefs of any church. This policy has been followed in the curriculum committee under my supervision as president. It is open to any religious faith to present to the curriculum committee suggestions about materials or the materials themselves from which selection may be made. I have never heard of any Protestant denomination or their [fol. 292] representatives protesting to the curriculum committee about the material selected or to the manner in which they were selected.

Q. Are you in position to testify regarding the relative number of pupils who did and did not participate in these courses in the various classes?

A. Yes.

Mr. Chapman: Objection as not cross-examination.

Mr. Franklin: Mr. Chapman has interrogated about his qualifications as president of this council, his general ac-

quaintance with the manner in which it was being conducted, and I think he has operated up the whole field.

The Court: Sustained as not cross-examination.

Cross-examination.

By Mr. Rall:

There is available enough material for the purpose of teaching religious education from sources which represent the common, fundamental concepts of a number of people of Protestant denomination.

Redirect examination.

By Mr. Chapman:

Anyone who wishes may submit material to be used or taught in these courses. We cannot accept everything that is offered. There is too much offered. When I was on the curriculum committee material was submitted that was in conflict with the teaching of my own church. It was probably not acceptable to a good many churches.

[fo. 293] Rabbi Judah Goldin, called as a witness on behalf of relator, having been duly sworn, testified as follows:

Direct examination.

By Mr. Chapman:

My name is Judah Goldin, assistant national director of the Hillel Foundation. Before coming here I taught four years in Duke University. I have been away for two years. I lived here from '39 to '43, during which time the religious education system was installed in the Champaign schools. It first came to my attention when I was called to a meeting held in the Wesley Foundation. Mr. Cartlidge presided. It was attended by about a dozen of us. I do not recall who they were. I cannot remember exactly what happened. I remember religious education in the school system was discussed. I probably participated in the discussion.

Q. If you remember, do you recall whether you approved or disapproved at that time?

Mr. Peterson: Objection.
Mr. Franklin: Objection.
The Court: He may answer subject to the objection.

Q. Do you recall whether or not you approved or disapproved of religious education in the public school at that time?

Mr. Peterson: Objection.
The Court: Sustained as to form.

Q. Do you recall any discussion with reference to teaching religious education in the public school buildings of Champaign during school hours?

Mr. Franklin: Objection.
The Court: Sustained as to the form.
[fol. 294] The Witness (Continuing): This meeting was called about religious education in the public schools. That is what was being discussed.

Q. Do you recall whether you approved or disapproved of it at that time?

Mr. Peterson: The same objection.
The Court: He may answer.
The Witness (Continuing): At the time it was discussed I said I wanted to know first whether it was legal and if it was determined to be legal the Jewish group which I represented would continue as we were, going along with our supplementary religious education. If the project went ahead we would cooperate.
The first year, 1941, a young man by the name of Nogah Bethlahmi taught in the public school buildings of Champaign during the regular school hours of the secular days. The following year the Jewish religion was taught in the public school buildings in Champaign during the regular school hours by Miss Helen Simons. Since then there has apparently been nobody there to teach it. The teaching on Jewish religion was under my supervision when I was here. I did not teach any of the Christian religion in connection with that teaching; I do not teach. What I teach is in accordance with the Jewish belief.
I am affiliated with the B'nai B'rith Hillel Foundation. B'nai B'rith has no doctrines and beliefs. I am a member of the Rabbinical Assembly of America. Its doctrines and beliefs are Judaism. I am familiar with those doctrines.

Within the doctrines and teachings of Judaism it is accepted as true that there was a man called Jesus, the records show it. According to the doctrines of Judaism God was not his parent in the physical sense. According to its doctrine Jesus was no more divine than any other man. When you [fol. 295] ask me "Do you accept the story as true that Jesus was killed and after he had been dead two or three days came to life again", the story is in the New Testament. So far as Judaism is concerned, that is a doctrine which history has given us. That is what the story tells us.

Judaism is a way of life which has a system of its own. Christianity is a way of life which has a system of its own. Judaism has nothing to do with Christianity. Christianity has nothing to say about Judaism in that sense, except that Jesus is Jesus and Judaism has nothing to say about a man called Mohammed. Jesus or Mohammedism has nothing to say about Judaism in that sense. If I am asked "Does Judaism accept that Jesus as Christ was crucified, that He was resurrected three days later", my only honest answer can be: "That is what the New Testament teaches us." "Acceptance" is decidedly mental. Obviously, Judaism cannot react one way or the other. The New Testament is not incorporated as a part of Judaism. The B'nai B'rith is a fraternal order.

ELMER C. BASH, an intervenor, called as a witness on behalf of relator, under Section 60 of the Practice Act, having been duly sworn testified as follows:

Examination.

By Mr. Chapman:

My name is Elmer C. Bash, 512 South Highland, Champaign. I am a roofing contractor in Champaign at 606 N. Walnut Street, under the name of Bash Roofing Company.

I have filed an intervening petition in this proceeding. I desire that my daughter, Wanda I. Bash, continue her work in the ninth grade on released time. I am of the opinion [fol. 296] that her well being, education and character will be benefited by such education. I base that opinion on our experience in the past from the results of the classes she had the last three years. I do not claim to base my opinion on any particular facts, it is an intangible thing. I believe

that it has taught her tolerance, taught her to get along with fellow classmates much better, and has taught her something about the Bible that she did not have before, and I hope it will continue. She began taking these classes in the 6th grade. Her association with children has improved during that period. Previous to this period she was not active in outside interests outside the classroom, as she had been later, but these outside interests brought her in contact with other children of her own age. I do not know that I am able to separate the benefits of religious education from the education she received in other courses.

I have another daughter, Shirley, who has taken the course in religious education She started taking the course in 7th grade, Wanda started in 6th grade. I cannot remember noticing any improvement in Shirley's tolerance and association during the first year she took the course.

It is my desire that they continue to take religious education, Protestant. I am affiliated with the First Christian Church. There they have Sunday school on Sunday morning. I do not know if they have any classes for children there during the week. I have not attended classes of the religious education course in the Champaign schools. The only study I have made of the material used for teaching in the class is when it has been brought home by the children and by the discussions which the children have had. It has been agreeable. It does not appear that they are learning anything there that I do not believe in.

[fol. 297] VASHTI MCCOLLUM, the relator, having made affirmation in due form in lieu of being sworn, testified as follows:

Cross-examination (Resumed).

By Mr. Franklin:

I have seen Defendant's Exhibit 300 for identification before. That is my handwriting. I gave that to my son, James Terry McCollum, during the time that he had enrolled in the 4th grade in the South Side School for the purpose of having him hand it to his 4th grade teacher.

(Whereupon said document was offered and received in evidence as Defendant's Exhibit 300.)

Defendant's Exhibit 300, being a letter in words and figures as follows:

"DEAR MISS HOLLINGSHEAD:

Terry says he wants to join the Religious Ed. Class so I'm sending you this note to say it is O. K.

Sincerely,

VASHTI MCCOLLUM."

Whereupon relator rested.

MOTION TO DISMISS OR TO STRIKE AND DENIAL THEREOF

(And thereupon at the conclusion of the evidence on behalf of relator defendant moved in writing to dismiss the petition or, in the alternative, to strike certain allegations thereof.)

Mr. Rall: The intervenors join in this motion.

The Court: The motion will be overruled at this time without prejudice to your right to renew it at the conclusion of all the evidence.

The Court is going to require all the parties to put in all the evidence they expect to offer and rely upon without prejudice to your right to raise at the close of all the evidence all the questions that you are raising in this case. [fol. 298] Mr. Franklin: I believe the court is preserving all of the rights in the matter, but we object to the overruling of the motion at this time.

(Whereupon the court overruled without prejudice the motion on behalf of defendant at the close of plaintiff's evidence with leave, without objection on behalf of relator, to renew said motion at the close of all the evidence.)

Whereupon the defendant and intervenors, to maintain the issues in their behalf, offered the following evidence, to-wit:

ELMER C. BASH, an intervenor, called as a witness in his own and on defendant's behalf, having been previously sworn, testified as follows:

Direct examination.

By Mr. Rall:

Both my daughters, Shirley and Wanda, took these courses in religious education in the public schools of

Champaign with my consent. I discussed it with them at the time they brought the cards home for me to sign giving my permission to take the course.

Q. At that time or at any other time did either of the girls ever state to you that they wished to take the work because if they did not do so they would be unlike other children?

Mr. Chapman: Objection to the form as leading, and also as calling for testimony out of the presence of the adverse parties and the relator.

The Court: Overruled.

A. No question was ever raised.

Q. Did they at the time or at any time in your presence or to your knowledge criticize any of the pupils who did not take work in religious education?

[fol. 299] Mr. Chapman: Objection; criticize is a conclusion.

The Court: Sustained.

The Witness: (Continuing.) They never made any comment in my presence about students who did not take the work in religious education.

Alice J. Bash, an intervenor, called as a witness in her own and on the defendant's behalf, having been sworn, testified as follows:

Direct examination.

By Mr. Rall:

My name is Alice J. Bash; 512 South Highland, Champaign. I am the wife of Elmer C. Bash and am one of the intervening petitioners. I am the mother of Wanda I. Bash and Shirley.

Shirley has taken the work in religious education through her 7th and 8th grades. She is now in senior high school. The work is not given in the senior grade in high school. Wanda has taken the work in the 6th, 7th and 8th grades. She is now in 9th grade, the last year of junior high school. It is my wish that she continue with the work in religious education during her 9th year.

At the time they started the work they asked permission of Mr. Bash and myself to take it. In the grade schools we signed the cards. In the junior high school Wanda wrote "Course in Religious Education" in where it says "Do you wish to take band, orchestra, or religious education," and I signed it. That is the schedule they fill out and get your written approval. At all times I knew and approved of her taking the work.

Q. Do you believe the work in religious education which each of the two girls took has in general been beneficial to them?

[fol. 300] Mr. Chapman: Objection as leading.

The Court: Sustained as to form.

The Witness: (Continuing.) I think taking the work in religious education has developed their character. I feel it is a part of their education for living every-day life.

At the time they asked my permission to take the work they did not, nor have they at any time, stated as a reason for wishing to take the work that if they failed to do so they would be set apart or would be unlike other children. Many of their friends did not take it. It has not made any difference in their friendship. They have made no comment about their not taking it.

Cross-examination.

By Mr. Chapman:

These children received religious education in my home. We read a little book called "The Upper Room", and sometimes read the Bible. The thirty minute period is devoted to religious education in the school. We read those materials sometimes. It has been a book called "Interesting Questions." It takes up character building, such things as boys and girls should do when they are in groups, for ordinary training. I believe it is synonymous with religion. I would not take anything for those evening meetings together. The book deals with character building and religion. Religion is part of character building. I think that in ordinary, every-day living parents should be models rather than critics. I try to set before my children my example of good character myself. I do not believe that chil-

dren have a tendency to imitate any of the people they live with. Children learn by imitation sometimes; I believe that children learn some things from people they live with because that gives them a chance to make up their own minds how they should choose to live. I have given some atten-
[fol. 301] tion to teaching them ordinary morality rules of conduct for social relationship with other people, such as rules of politeness, traits of courtesy; most parents do.

I have given quite a bit of attention to the raising of my children; one of them was elected to an honor position last year in 8th grade.

My two daughters attend the church Sunday school regularly. I attend church too. I do not know if the church has weekday classes. My children do not attend any. My children make high grades in school and engage in extra-curricular activities to some extent. They have achieved some scholastic honors. I rarely assist them with their home work. I took quite a bit of interest in their learning from the time they started school. I do not go to the Bible to decide what to tell a child to do any more than to the dictionary. In teaching my child right from wrong the Bible is uppermost in our minds. That is the way they are guided to the thing that is right or why it is wrong. They have to learn that through everyday living. In my opinion, this 30 minutes of religious education in school is beneficial to them. I believe it would be more beneficial if they had an hour of it. A day of it might be overdoing a good thing. There is an extreme in everything.

Q. Did you ever consider sending your daughter to theological school?

Mr. Peterson: Object as immaterial.

The Court: She may answer.

The Witness: (Continuing.) We have not considered sending them. We prefer our children be taught the Protestant faith. I think it would be interesting for them to know about all religions. I prefer the Christian Protestant religion. The denominations do not make too much differ-
[fol. 302] ence. I was a Methodist, now, I belong to the University Place Christian Church. I do not know anything about the Holiness Faith Healers with the rattlesnakes. I do not claim to be acquainted much with all the Protestant denominations.

Q. How many Protestant churches are you familiar with?

A. Are you getting into the Bible doctrine of all of them? I am not too familiar.

Mr. Peterson: There should be some limitation, it is no part of any issue.

The Court: Objection overruled.

The Witness (Continuing.) I am not a student of religion nor an author on the doctrines of the Christian church. I do not claim to understand the doctrines of all the other churches. I have visited various churches and attended their services. I have not attended the church of the Holiness Faith Healers nor any meetings of Jehovah's Witnesses. I do not claim to be an authority on their faith nor to be familiar with them. I am not too familiar with Christian Science or Mormons.

I think every parent prefers his children to be taught the religion that the parent prefers. If we had teachers from the Christian church teaching religion I would not necessarily prefer that my children attend their classes; I would just as leave they attended Methodist.

Redirect examination.

By Mr Rall:

When I said I prefer my children be taught the religion I prefer myself I presume I was speaking of Protestantism generally. From my experience in attending various Protestant churches I believe there is a large mass of fundamental information and religion upon which Protestant denominations generally agree.

[fol. 303] Recross-examination.

By Mr. Chapman:

That material is the Bible, upon which they all agree. Certain sects of Protestants agree on the Bible. I have never investigated why those different churches interpret the Bible differently. There is some difference of interpretation of the Bible between the Methodists and ministers of the Christian church. I do not know that the ministers in my church interpret the Bible a little differently from the Presbyterians. I think there is a difference in the interpre-

tation placed on the Bible by the Christian Scientists than the interpretation of the ministers of my church.

Q. Do you know of any way of accounting for these different churches among the Protestants having different understandings of the Bible?

Mr. Peterson: Objection.

The Court: She may answer.

Q. Do you believe that the differences in opinion about the Bible have caused the differences between many of the churches?

Mr. Peterson: Objection as not cross-examination.

The Court: Overruled.

The Witness (Continuing): I do not know. I have not given that matter any thought. I want Protestantism as I understand it generally taught to my children. I do not especially prefer the Protestantism of my own church over that of other churches. I think Protestantism is a good faith. I think it is good to learn about all religions so they will know how to make up their minds on which religion they wish to pursue. We do not want to say you have to do this or you have to do that. They are capable of thinking things out for themselves, I think.

[fol. 304] Eugene Harvey Mellon, called as a witness on behalf of intervenors and defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Franklin:

I am superintendent of schools here. I have seen the exhibit marked Defendant's Exhibit 301, which was previously marked Relator's Exhibit 3 for identification. That is a monthly report of moneys received which I make to the board of education. This report is turned into the township school treasurer and signed by him as money received. It bears his signature. It was delivered by him and signed on the date it bears. It was prepared in the regular course of business in my office.

I have general charge and supervision over both the teach-

ing staff and the physical plant equipment in the different schools of the system. With the board of education I make the rules and regulations for the use of the physical equipment and the rooms, and for the guidance of teachers under my control.

The elementary school teachers, grades 1 to 6, are expected to be on duty at 8:30 in the morning; the junior high school at 8 o'clock; the senior high school at 7:45. They are expected to remain until 4 o'clock in the afternoon. On many occasions they stay longer. The school building is expected to be heated at regular school temperature at 8:30 in the morning. We usually get up to that temperature at 8 o'clock. The custodian leaves the grade school building at 5 o'clock, and it is kept up to that temperature until that time. In the junior high school the building is heated all the time. We have night janitors. There have been no changes in the hours during which the junior high school [fol. 305] or any of the elementary school buildings have been heated since the religious education classes were commenced in the public school buildings. No more heat is required or occasioned by reason of religious education classes in these buildings.

The elementary school rooms are cleaned once a day, usually in the evening. Sometimes they get cleaned before school starts in the morning, if it is not all done the day before. I am not sure whether a room is cleaned every day whether it is occupied by one class meeting or more. If they are in use they are cleaned, whether they have been used much or little.

The general practice with reference to artificial light in the class room is to use sufficient light, as much light as the child needs. But the teachers are warned several times during the year to use as much natural light as possible. That is for health reasons as well as economy. The school rooms are built to procure as much natural light as possible. The natural light falls over the student's left shoulders. It is customary to use the artificial lights during the course of the teaching day when they are needed. Generally that would be on a dark day. Most of the rooms can be used most of the time without very much light.

The blank which Miss Chapin spoke of on which she records absence of any pupil registered in the religious education class would be printed and used if there were no religious education classes in the schools.

Q. Has the board of education in this case expended or paid out any funds in aid of these religious education classes?

Mr. Chapman: Objection. That is one of the things the court will have to determine.

[fol. 306] The Court: Objection sustained.

The Witness (Continuing): I am acquainted with the expenditures made by the defendant school district. No moneys to my knowledge have been paid out or expended by the defendant in connection with or because of or for the benefit of the religious education classes.

In the conversation which Mrs. McCollum testified concerning, where she said I said "If the American Legion objected I would not allow the Jehovah's Witnesses sect to use the public school buildings for religious education and instruction," I did not mention the American Legion. Mrs. McCollum said, "What would you do if the Jehovah's Witnesses came in and taught children not to salute the flag". I said "That would go a little further." I am familiar with the Supreme Court decision regarding saluting the flag and know what we could do and could not do. The situation has not arisen.

These schedule cards are prepared for use in the regular school program under my control and supervision. As far as I know they were in use prior to the institution of the religious education classes in the school buildings. That is a regular educational practice for our own convenience.

Cross-examination.

By Mr. Chapman:

No funds of any kind have been applied in any manner, shape or form by the school board with reference to religious education. I am employed by the board of education of school district 71. They pay me a salary. I receive no other compensation. I render services to people other than the school board. I am not paid for that work. I do [fol. 307] some work in service clubs and churches. At my office I sell war stamps and war bonds and collect money for the community chest, and a lot of other things that we do. The PTA comes into my office many times to hold conferences.

I usually appear at work at 8 A. M. and leave my office at 5 o'clock, with time out for lunch. I devote a lot of my time to my duties other than those I have mentioned. We have had inquiries from various cities about our religious education program and have sent out a few letters in answer to the request. I prepared a form letter. It would not take as much of our time. The school board paid the postage. The stationery was school stationery. My assistants in the office addressed them. Sometimes I signed them; probably they were mimeographed with my signature on. They are all paid by the school board. In the junior high school we have a schedule form for the students to fill in. Those schedules are printed commercially. We buy them printed at the expense of the school board. They are distributed through the principal's office in the junior high school. The word religious education does not appear on the blank anywhere that I know of. The child has to write it in. The blank is approved by the parents and then goes back to the principal's office and is kept there. The only record of his taking religious education is on the blank. That is a registration blank which we keep in our junior high school office. That is financed by the school board. We should have a collection of registration blanks there of people who took the junior high school work for some years.

Last spring I think 500 of the cards that are used in the grade school were mimeographed in our office by our clerical [fol. 308] staff. We had some old stock of colored paper that we used. That paper belonged to the school board. We used the mimeographing machine in my office. Miss Chapin came in and got those cards. They were lying there until she came. A clerk did the mimeographing. He was employed by the school board. I think she paid $1.05 for the mimeographing of those 500 cards. That covers all the expense of the cards and labor. That is what it was applied on. I think that is the first time we had prepared any cards. 500 lasts two years. I am not sure that these are the only cards we prepared for her. I have only been there 2½ years. During the time I have been there I do not remember any others. 27 janitors are employed in the entire system. We have 1½ janitors for the Dr. Howard, one works afternoons only. He has other duties during the forenoon at other schools. We have one man there all the time during the

day and a man who comes in the afternoon. Each is paid a fixed salary for doing all the janitor work that is done in the building.

The religious education classes are sometimes conducted in class rooms not being used by other classes. That is done at the Colonel Wolfe School. The same class rooms in which religious education classes are conducted are sometimes used for other classes. We do not use any class rooms for religious education that we do not use for other classes.

I think we have about 6 classes a week in religious education in Dr. Howard School. That would be one class in each 6th grade, one in each 5th grade, and one in each 4th grade, once a week. I am not sure if they are nearly all conducted on the same day. The building is heated with coal bought by the school board for heating the building. In the South [fol. 309] Side School the basement room used for religious courses is a sort of a school library. It has the same temperature all the time. It is a little ante room with one end of it fixed up as a library. I take it that is what Father Higgins referred to. I cannot answer whether when a room is set aside for teaching a religious education class it is not used by other students during that class. These class rooms are all under my supervision. I do not believe that the question has come up but I think our policy will be not to permit them to be used for religious education classes while students were using them for something else. We would try to keep them separated as much as possible. I would rather Father Higgins would have the room to himself for those 30 minutes in order to avoid conflicts. The other room in the basement of the South Side school is used by the kindergarten and has the kindergarten office. They are semi-basement rooms on that floor. It is not really a full basement. The room is equipped with chairs and has full windows. I suppose artificial light is used there. They have the fixtures. When these religious education classes use the class rooms anywhere they use the same desks that the other students use, the same blackboards when they use a blackboard. We do not equip these desks with ink or ink wells. The child brings his own writing materials.

Redirect examination.

By Mr. Rall:

If by order of court or otherwise the teaching of religious education in the junior high school building was discontinued there would be no change in the form of the schedule or in the manner that we have used it, having it signed in the home and returned to the teacher, or the manner the [fol. 310] teacher handed it to the principal, or in the manner the principal stored it among the records as a registration slip.

Redirect examination.

By Mr. Franklin:

The board does not prescribe the number of hours that I must devote to school administration or the time I arrive at or leave the office. I make it a practice to answer on school stationery all reasonable correspondence that comes to me. That is a part of administering and maintaining public relations. As a school administrator I believe it would be very inconvenient and impractical to release children from the school in Champaign for the purpose of their going for religious education to church buildings. Because of the distance it would be impracticable in some cases, and would expose the children to danger, because the schools which are located in the north, northwest and southwest parts of our city are quite a distance from churches. It would mean traveling 10 or 15 blocks across busy traffic streets. We have a pedestrian hazard in the City of Champaign.

Recross-examination.

By Mr. Chapman:

If they were sent to the churches there might have to be somebody in charge. I imagine somebody would have to see that they went to the churches and did not go home or play along the way. These children are under the supervision of the teacher from the time they are in school until they are dismissed. I think we could send them to a church without a teacher supervisor in going and coming. If we released the children at 9:30 in the morning to go to a church

two miles away and he came back at 11:30 he would not have to be under the teacher's supervision from the time [fol. 311] he left school until he got back. I do not think the school could assume such responsibility. That would be up to the children. I don't think we would have much jurisdiction over them if we released them for religious education and they were free to go where they pleased. We would lose jurisdiction over that hour. It makes it much more convenient to keep them under our supervision. Where they stay and take religious education in the school we do not leave them out or allow them to play during that hour if they have their parents' permission to take religious education.

Q. The fact that the teacher just turns the class loose when the religious education teacher comes in the room, that would not be more convenient than sending the children out of the room or out to play, would it not?

Mr. Franklin: Objection.
The Court: Sustained.

Q. Is not it also a fact that it is more convenient to have them attend the religious education classes if you have them right in the school where they do not have to empty out the seat to get away?

Mr. Franklin: Objection.
The Court: Sustained.

CAROL RIDENOUR, called as a witness in behalf of intervenors and defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Franklin:

My name is Carol Ridenour; 1515 West Church, Champaign. I am 11 years old. I have lived in Champaign [fol. 312] almost a year. I started Dr. Howard School in October of last year, Mrs. Taylor's 5th grade. James Terry McCollum was in that class during the last year from October on. At no time did I hear Mrs. Taylor urge any of the children in the class to take religious education. I never heard her say she would like to have the class 100%

in the religious education class. I heard her use the expression 100% in connection with war stamps and war bonds and things like that. She wanted 100% in war bonds and stamps as a matter of pride with the class. I never heard the boys or girls in my class tease James about taking religious education work. I never heard them say anything to him about not taking religious education work. I never heard any of the children about the school tease or make fun of him about his failure to take part in the religious education classes. I never heard him called an atheist by anyone. I never heard the word around the school at all. I know now what the word means, I read it in the paper. I know what it is to be embarrassed. I do not think I ever saw James embarrassed about the school or the school room or the school premises with reference to any matter of religion. I do not know of any of the children having been embarrassed about it in any way. I never heard the subject of religious belief or the difference between children's religious beliefs ever discussed around the school room or the school premises.

I missed some school after I started in the fall. I don't remember how much, I do not think it was as much as a week. I got along all right in school and passed into the next class. I was not sick at all during the year.

[fol. 313] Cross-examination.

By Mr. Chapman:

I took the course in religious education. I attended all year. I had enrolled when I came to school in October. James did not sit near me in school; I was on the opposite side of the room from him. I don't remember how many were sitting between us. I sat nearer to the corridor. I did not become too well acquainted with him last year, I usually played with the girls. I don't remember if he played mostly with the boys. I saw him at recess. The teacher played with us in the playground outside. None of the children ever went away to play alone. In the afternoon the children played together at recess in the morning, the girls played together and the boys played together. We did not play indoors. On bad days we do not have recess. We had deep snow last year. I never heard Mrs. Taylor and James talking with each other. I did not watch to see what became of him all the time. I

was not especially interested in him any more than the rest of the children. I do not know if he was teased when I was not around or if he was called atheist when I was not around, or if he was embarrassed at any time when I was not around.

Q. You do not know if the religious beliefs were discussed at any time when you were not around?

Mr. Franklin: It is elementary she could not know those things.

The Court: Objection sustained.

[fol. 314] Helen Benefiel, called as a witness on behalf of intervenors and defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Franklin:

My name is Helen Benefiel; 702 West Columbia Avenue. I am 13 years old and am in 9th grade. I have gone to the public school system in Champaign regularly since I started in school. I went to Dr. Howard School and junior high school. The religious education classes have been offered in all of the schools that I have attended during the last four or five years. I have not been participating in them.

When I was in grade school those in religious education went out to another room and I stayed where I was. I did not ever feel embarrassed as a result of the religious education class being in the school or my not participating in them when others did. No one ever exposed me to shame, hatred or contempt as a result of it. No one ever mentioned it to me or quizzed me or asked me why I did not take part in these classes. My public school teacher never urged me or tried to get me to take the work. I never felt that my religious difference if any was being pointed out by my not taking part in these classes. With me it was just like any other elective subject whether I participated in the work or not.

Cross-examination.

By Mr. Chapman:

I attend the First Methodist Church in Champaign. I do not know of any differences in my religion and that of Mrs. Taylor. So far as I know my religion is not much different from most of them. I do not know whether James [fol. 315] Terry was embarrassed at any time or not. I was not in his room. I was not in the Dr. Howard School at any time that has been referred to.

My teacher last year was Mrs. Sampson in the 8th grade of Champaign junior high school. When I was in the 6th grade in the Dr. Howard school the religious education class was there. I think about ¾ in my class did not take the course at that time. Those who did take it left the room. I was one who stayed. I do not know where they went, I never checked up on them. I am not taking any religious education class in junior high school.

Alice Allen, called as a witness on behalf of intervenors and defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Franklin:

My name is Alice Allen; 1501 West University, Champaign. I am in 10th grade. Before going to junior high school I attended Dr. Howard School. I did not take religious education. Just a few of my friends took it. The fact that they took the course and that I did not take it did not affect their attitude toward me or my attitude toward them. It did not make me feel that as a result of my not taking the course any religious difference was manifested or emphasized or pointed out between myself and them. No one ever questioned me as to why I did not take the course or ever urged me to take the course. I never felt that I was under any compulsion, force or coercion to take the course.

[fol. 316] I attended the Dr. Howard School 4 years ago, in 1941. I was 11 years old when religious education first began to be taught in the Dr. Howard School, in the 6th grade. I don't remember how many from my class took

the religious education, not very many. These who took it left the room and went to the library. Most of us stayed and went ahead with our other work.

I do not know of any religious differences that I have. I am affiliated with the First Prebyterian Church. Most of the students in my class agree with me pretty much in religion. Most of my friends in that school did not take it.

Redirect examination.

By Mr. Franklin:

I do not take any in junior high school. Not a great number of my friends take it in junior high school, but more than did in 6th grade. I do not have any feeling of embarrassment about the fact that I do not take religious education in junior high school. I do not believe that matters of religion or religious differences were ever discussed when I was in the 6th grade or in junior high school.

JANET HOLLINGSWORTH, called as a witness on behalf of intervenors and defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Franklin.

My name is Janet Hollingsworth, 403 South New, Champaign. I am 13 years old and am in the 9th grade in junior high school. Before that I went to South Side School. [fol. 317] That had religious education classes in my grade at South Side. I took it and then dropped out of the course. While I was at the South Side School in the courses I never felt any embarrassment as a result of participating or not participating in the classes. The children did not question me as to why I took the courses or why I did not take them. Neither the teachers nor my classmates ever urged me to take the courses. They did not attempt to coerce or force me in any way to participate. I did not feel that I should take the courses because other people wanted me to or anything of the sort. I did not feel any embarrassment at any time about not taking part in the class. I did not take the classes in junior high

school. I did not feel that I was under any compulsion whatever to participate. No one urged me to take the courses. I was not embarrassed as a result of not taking them. I never heard anyone who did not take the course discussed by other children for not taking them or about why they did not take them.

I have friends at South Side and junior high school who did take the course when I was not taking it. That did not affect our friendship at all.

Cross-examination.

By Mr. Chapman:

I did not form any particular friendships in that room during the time that I took the course. I knew about 5 in that grade. It did not make any better friends with any of them, I still had friends. It did not affect my friendships at all.

It has been 3 years since I was in the South Side grammar school. I was about 11 years old the last time I was there. [fol. 318] I was in 6th grade then. I am not acquainted with any of the teachers in South Side. When I was in the 6th grade there were quite a few who took religious education in my class when it started, I think about ½ of them. There were between 35 and 40 pupils in my class at that time. The ones that did not take religious education went out of the class room. We went downstairs to another room. During those times we worked on our board work or on studies. At first I took the course. When I took it I stayed in the class room. I did not have to make up any time that I spent taking religious education.

Patricia Hazelton, called as a witness on behalf of intervenors and defendant, having been first duly sworn, testified as follows:

Direst examination.

By Mr. Franklin:

My name is Patricia Hazelton, 1204 W. Church. I am 15 years old. I attended 6th grade in Dr. Howard School and I went to junior high school. I have not attended the course in religious education either in 6th grade at Dr. Howard

School or during junior high school. During that time I have no memory of the other pupils in my class. I have been friends with most of them. The fact that I did not participate with others in the religious education classes at Dr. Howard School in the 6th grade did not affect my attitude toward any of the other members of the class or their attitude toward me an any way. It did not result in anyone questioning me about why I did not participate. No one inquired of me what my religion was, that stopped me from going into those classes. I was at no time urged by my regular public school teacher to participate in the classes.

[fol. 319] At junior high school I had friends who took the class and friends who did not. None of them expressed to me any curiosity about why I did not take the course. No one sought to force me or urge me to take the class in junior high school. I never heard anyone discuss why they did not take the courses.

My own attitude is that I am not embarrassed in any way to be attending a public school where some people take religious education courses and some do not.

Cross-examination.

By Mr. Chapman:

I am not embarrassed at all. I did not explain to my teacher why I did not take the course. We were asked to register if we wanted to take and I did not register. Nothing more was said about it. That was in 6th grade. My 6th grade teacher gave me a card. I took the card home. My parents said I was not to take the course but they signed it and I took it back. I gave it to my 6th grade teacher, I think. I don't remember if the card said what church I belonged to. When I was in 6th grade that was the first year the course was given and just a few were taking it. Those that took it left the room and went to the library. When they got up to leave I did not look up to see who was leaving, I never paid any attention. I noticed when anybody left, went out of the room, but I did not pay particular attention. It was the same way as I would go into a room. I saw they would go out of the room. When they came into the room I noticed. I knew where they had been. I have no religious differences or traits that are different from those of other children.

[fol. 320] JOHN RUSSELL, called as a witness on behalf of intervenors and defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Franklin:

My name is John Russell, 1218 West Park, Champaign. I am 12 years old. Last year I was in the 5th grade at Dr. Howard School, the same grade with James Terry McCollum. The grade is divided into two classes; I was in the opposite class. I knew him from seeing him around the school and playing with him. I did not take the religious courses. About 5 or 6 in my part of the class did not take them. Altogether there were about 25 or 26 in the classroom, so that about 22 took the course and 5 did not. Those who took the course included some of my friends. It did not make any difference in their friendship for me or mine for them because they took the course and I did not. I did not feel embarrassed in any way about it. My teacher did not try to urge me to take the religious education. I feel perfectly free not to take it. I never saw anyone tease or kid Terry McCollum about not taking the course or about his religious belief. I never heard the word atheist before this case started, and never heard it applied to James Terry McCollum by anyone. I did not pay any attention to how he got along with the other boys.

Cross-examination.

By Mr. Chapman:

I do not know how old he is. I think I am bigger than he is. I was not in Mrs. Taylor's class last year, I was in Miss Johnson's. I was one of the 5 or 6 who did not take the [fol. 321] course. The others were Billy Bush, Billy Sholom and Robert Mower. We who did not take the course went to the library with the teacher. There we studied our work and had weekly readers to read. Miss Chapin taught religious education in Miss Johnson's room last year. I did not pay much attention to James last year.

MARY LOU TERRY, called as a witness on behalf of intervenors and defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Franklin:

My name is Mary Lou Terry, 1215 West Park, Champaign. I am 14 years old, in the 9th grade in Champaign junior high. Before that I went to Dr. Howard school. I was in Dr. Howard school when the religious education classes were being offered there. I did not take the course either there or in junior high. Some of my friends took the courses, some did not.

Q. Did the fact that you did or did not take the courses have any effect or affect in any way the attitude of other people toward you?

A. No.

Mr. Chapman: Objection as calling for her conclusion.

The Court: Overruled.

The Witness (Continuing:) It did not affect my friendship in any way with the girls or boys who took the classes or with those who did not. I did not feel that I was under any compulsion to take the course. No one ever urged me to take it. In junior high school some of my friends took the courses. It did not seem to affect the regard which they had for me in any way because I did not take the course. I [fol. 322] never heard religion discussed around the school, the school rooms or the school buildings, among the children. No one ever inquired what my religion was or why I did not take the courses. I was at no time embarrasssed in any way as the result of religious education classes being held in the public school buildings.

Cross-examination.

By Mr. Chapman:

Nobody talked to me about religious education. The teacher did not mention it in class. In junior high the teacher did not pass cards out to take home. I can't remember whether they were passed out in 6th grade in Dr. Howard school. Not very many in the class in Dr. Howard

school took the course. In junior high about half of my friends took the course.

I go to the Presbyterian church but I do not belong. I do not know why I did not take the course in the 6th grade. My mother just did not want me to join the class because I went to the Sunday school. I guess she thought that was enough.

BARBARA BECKER, called as a witness on behalf of intervenors and defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Franklin:

My name is Barbara Becker, 704 W. Green, Champaign. I am 14 years old and am in 9th grade. I have been in the public school system here for 4 or 5 years. Before junior high I went to South Side school. There they had religious education classes in the 6th grade. About half of the class took the course. I did not take it at all during the 6th grade. [fol. 323] I have friends who did. That did not have any effect at all on my friendship with those who did take the courses. At no time during the 6th grade did I feel any compulsion to take the course. My teacher never urged me to take it. I never heard discussed among the children the question of why one took the course and why another did not. The matter of religious difference was never raised in my mind as a result of religious education courses.

I did not take the courses in junior high. There was no embarrassment there as a result. There was no difference in my mind between electing not to take religious education and electing not to take band or glee club.

Cross-examination.

By Mr. Chapman:

The subjects that we can elect are orchestra, glee club and religious education. I was more interested in orchestra than religious education because I got my religious education in Sunday school. I can sing, but not very well. We had 3 choices but were not required to take any of them. We could have taken one or 2 of the 3. I don't know if we

could have taken all 3. It depended upon your schedule. Religious education was one of the elective courses.

I have quite a number of friends in school and have always had. I have been rather active in extra-curricular activities. I do not belong to any societies or organizations, no debating clubs or dramatic club outside of school. In school we have the Retro Club, that is our school book. Everybody could get on if they feel like it. It takes some extra work. I imagine you have to be pretty good in your studies before you can get on something of that kind. You [fol. 324] would not have to be of the highest grade to get on there, if you get about 4 points you could belong on the staff.

In the 6th grade I was in the class of Miss Reloff, our principal. I believe Miss Chapin handed cards about religious education to Miss Reloff and she passed them out. She told us we were to take them home for our parents to sign if we wanted to take religious education. I took mine home and brought it back and placed it on my teacher's desk as did the other students.

I do not belong to a church but I attend the First Methodist Church. I have not found the religious ideas of most of the other children very much different from mine. Religious matters were not brought out during school time. Most of my friends have about the same religious ideas as I do.

Mary Russell, called as a witness on behalf of intervenors and defendant, having been duly sworn, testified as follows:

Direct examination:

By Mr. Franklin:

My name is Mary Russell, 1218 West Park, Champaign. I am 14 years old and am in the 9th grade. I have been in the public school system of Champaign all my life. I went to Dr. Howard school before junior high. When I was there they conducted religious education classes. I did not attend them while I was in Dr. Howard school or when I went to junior high school. My non-participation in these classes did not result in any embarrassment to me. I have friends among those who took the courses. I did not feel any different toward them when I found they were taking the

course and I was not. That did not break up any friend-[fol. 325] ship and did not seem to affect my attitude toward them or theirs toward me. I did not hear the matter of religion discussed in connection with why some persons did not take the course and others did. I never heard any people in s hool criticized for taking the course or not taking the course. My public school teacher did not urge me to register in religious education. I did not feel any compulsion whatever brought upon me to participate in junior high school. I have friends who take the courses. It made no difference to me or to them that I did not take them. I never felt any embarrassment there.

Cross-examination.

By Mr. Chapman:

My religious ideas were not different from that of most of my friends. I attend the First Presbyterian Church. My religious ideas are about the same as most of the people of these classes.

I have known Barbara Becker for about 4 years. We attend junior high school. I have taken glee club as an elective there. I am in the same glee club Barbara is in. I do not know how many elective studies you may take in junior high. It depends on how your schedule is arranged.

Bessie Taylor, heretofore called as a witness on behalf of relator, having been previously sworn, was called as a witness on behalf of the intervenors and defendant, and testified as follows:

Direct examination.

By Mr. Franklin:

I am the same Bessie Taylor who testified before. I was James Terry McCollum's teacher during the 5th grade at Dr. Howard school last year. During the last half year [fol. 326] when he was the only one not taking the course, when the religious education class met, James left the room. He went into the music room for a part of the time that semester, for about 2 months he went into the other 5th grade room. The 5th grade youngsters were divided into

2 groups. During the last 2 months approximately of the last half of this year when the religious education class met in my room he went to the other class. Before that he took his work into the music room. He worked in there on whatever he needed to work on. I was in and out of the room supervising, to see how he was getting along during the period. Ordinarily I would have asked Miss Johnson, the other 5th grade teacher, to take care of the children I sent in there, but James was a problem in the room. I did not want to send him in there and cause her difficulties, cause confusion. I was afraid he would have an effect on the other children because he caused confusion in our room. Another reason I did not send him in was that it was very hard for him to keep his mind on his work. He had very poor working habits. Other children seemed to attract his attention until he just did not bother or he did not study his lessons much at all. I felt that to keep him in the music room would benefit him, that he would perhaps catch up and keep up a little bit on the many things in which he was behind. When he was alone he came back from the period with the work finished, as a rule. I usually kept the door closed because I felt if anyone walked back and forth James would be looking out and watching because that is all he ever did when anyone was walking around. The period was only a half hour and I would check up on him perhaps every [fol. 327] 10 minutes. He never mentioned that it bothered him when the door was closed. I had no idea of it until Mrs. McCollum told me about it. After that the very next time the religious education class met I put him in the other class.

The occasion when he was placed in the hall at the desk was when the music supervisor was in the building at the time and using the music room. There had been a vacant desk out in the corridor. I asked James if it was all right if he sat out there and he did not seem to have any fault with it so I turned on the light and allowed him to take his things there. I did not realize that he was feeling not taking the religious education so seriously, that any little movement from the children would be construed as making fun of him or I would never have put him there. I never did it again.

From my observation of the children the fact of his not taking religious education did not result in any embarrassment whatever. I never heard any discussion of religious education. I did not at any time urge the class to sign up

to take religious education in order to make the class 100%. It was a personal choice with them and their parents concerning which I had nothing to say except to hand out cards and tell them what to do with them. I never said anything about 100% in connection with religious education. I never privately told Elwin Miller and James Terry McCollum to join the class in order to make it 100%.

I knew why Elwin was not taking religious education. I suggested that he not take it the first semester. It was not because of any religious difference between Elwin and [fol. 328] other children; he had taken it before he came to the Dr. Howard school. He did not take it the first semester because he was a little weak in arithmetic and he was interested in doing his best towards making good grades. He needed to use his time in reviewing things in which he felt weak. The time he would otherwise have been taking religious education he worked on multiplication tables and problems which helped him in that respect.

I did not in any private conversation with James Terry McCollum suggest that he join the religious education class in order to make the room 100%. I knew his parents' ideas on the matter and I certainly would not have urged him to take it when I knew they did not approve.

I used the words 100% to the class in connection with the buying of defense stamps.

Cross-examination.

By Mr. Chapman:

I have not looked into Terry's religious views. I think he is a little young to really know himself. I only know his mother's views from what I heard her say. She told me on one occasion she did not approve of religious education classes, that she did not believe it should be brought into the school. She never told me at any time that she did not believe in the things being taught.

I am a member of the United Brethren Church. They do not have a church in Champaign. There is one in Chesterville. I have no scruples against religious education in the schools. I do not see anything wrong with it so far. I do not know whether Elwin Miller had any religious differences or religious characteristics that would differ from [fol. 329] most of the people. I do not know with which church he was affiliated. Nobody ever pointed out anything

about his religious differences or the difference between the Presbyterians and Catholics, and so forth.

During the last two months I sent James to the other 5th grade, Miss Johnson. When he was there I did not check on him at all. I checked on his work when he came back. Miss Johnson may have had recitations in her class while he was there. The children paid no more attention to him than they did to other children in the class. They were so interested in getting ready for their religious education classes they would not have noticed any walking around. When children leave the room the others would be probably conscious that someone is walking around. When somebody comes in the door people frequently look to see who it is. When James went there was no class in session, it was between classes. Students were in the room at their desks and when he entered Miss Johnson's room there were students at the desks there and they were there when he left. I never sent him into Miss Johnson's room until his mother requested it. I knew that other children attracted James very much. I can't say that he liked to be with other children. I think perhaps he was trying to attract their attention to make friends with him, but it did not work out that way.

The day that he was put out into the hall I knew that occasionally a child would walk up and down the hall. It did not enter my mind at the time that he would be seen sitting there because I did not know how James felt. I didn't put him out there to be a public exhibition. I was not thinking about putting him in solitary confinement when [fol. 330] I put him in the music room alone. I was doing the thing I thought was best for him at the time. While he was in the music room I did not time myself every 10 minutes, but I was in and out of the room and I knew what he was doing. While he was in Miss Johnson's room he had the comfort and benefit of the society of the other children.

Q. That was about the only way her room differed from the music room?

Mr. Franklin: Objection.

The Court: Sustained.

The Witness (Continuing): While he was in Miss Johnson's room he understood that he had to conduct himself

properly. The principal reason I sent him in there was becauses his mother wanted me to, since I had learned that he seemed to be concerned when he was in a room alone.

Rev. Herbert L. Miller, a witness heretofore called on behalf of relator, having been previously sworn, was called as a witness on behalf of intervenors and defendant and testified as follows:

Direct examination.

By Mr. Franklin:

I have the enrollment figures in the religious education courses for the past year. In the junior high school in 1944 and 1945 there were 134 children registered in the religious education classes. There were several hundred students in junior high school, in excess of 800. Last year in the 6th grade through the district there were 249 enrolled in the religious education classes. The total enrollment in the 6th grade is 295. In the 5th grade in the [fol. 331] religious education class there were 206 out of a total enrollment of 286. In the 4th grade 196 out of a total enrollment of 298.

Cross-examination.

By Mr. Chapman:

It has never come to my attention that some of the schools in Champaign have only colored children. I have never visited one of these colored schools. I have passed one of these colored schools during my work. I have visited the other grade schools. I have three children in junior high school. Those three did not take religious education. I did not sign a card.

Redirect examination.

By Mr. Franklin:

They did not refrain from participating because of any religious difference between them and those who did take the classes.

Recross-examination.

By Mr. Chapman:

My children may believe what or whoever they want to; they may go to anything that is right and proper. I wanted them to choose whether they want religious education or not because I wanted them to have free choice in their own church. Two of them chose to take it; one does not.

There are not very many people of the same faith as mine in Champaign. The congregation of my church numbers 365. There is also a student's church in the city with the same belief as mine.

Q. I believe you said there were not any great religious differences between the beliefs of your child and those of most other people; is that right?

Mr. Franklin: Objection.
The Court: Sustained.

[fol. 332] The Witness (Continuing): The one child has not stayed out on account of religious differences, she just does not care to take it. I presume she is too busy.

James Ridenour, called as a witness on behalf of intervenors and defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Franklin:

My name is James Ridenour, 1515 West Church. I am in 8th grade. I am 13 years old. I have not been taking the religious education courses. I am now in Junior high school. I came to Champaign about a year ago, knowing only the Campbells here, one family. The fact that some children took the work in junior high school and some did not, did not interfere with my making friends there. I have been allowed to make friends among those who took the course just as well as among those who do not take the course. No one inquired why I did not take the courses. It is not because of any religious difference between me

and the other children here that I do not take the courses, I just choose not to. No one makes any fun of me. I have not felt embarrassed.

Cross-examination.

By Mr. Chapman:

I belong to the First Methodist Church of Champaign. I do not know of any other people who have different religious beliefs or a religion that is very much different from mine.

[fol. 233] VIDER M. MCCLELLAND, called as a witness on behalf of intervenors and defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Franklin:

My name is Vider M. McClelland, 508 W. Charles, Champaign. I know James Terry McCollum. He was a classmate from the 1st to the 4th grades at South Side. When he was attending school and we were in the 4th grade, religious education classes were offered. I do not remember that he took the course, I did not. I think 4 or 5 of us in 4th grade did not take it. When the other children were taking the course we went to the science room and were given science books to read. We went there in a group, including James. We were under the supervision of a teacher. If I had wanted to take the religious education classes I could have. It was my decision not to. It was not because I had any different religious belief than the children who did take the course, I did not think it would be interesting. I did not feel any embarrassment by not taking these courses. I did not feel that my religious difference, if any, was pointed out by not taking the course. No one ever inquired of me as to why I did not take the course. My teacher never asked or urged me to take them.

I had an opportunity to observe James Terry McCollum in the classroom and the playground. I never heard anyone tease James about his not taking the course or ask him why he did not take the class.

Q. Do you know of any occasion when James was embarrassed in any way as a result of not taking the class?

Mr. Chapman: Objection.
The Court: He may answer.

A. No, sir.

[fol. 334] Cross-examination.

By Mr. Chapman:

I do not know of any times he was embarrassed. I did not keep track of him especially. I did not take any special interest in him. I am 10 years old. We were in the same class, I usually sat 2 or 3 aisles from him. I did not play with him quite a bit, I usually played with the other boys. From 1st grade to 4th grade you usually get quite well acquainted, I knew him pretty well. He never spoke of his religious beliefs.

I do not have a membership in any church. I go to the Christian and the Presbyterian and the Methodist. I am not decided. No one said anything to me about being an atheist when I did not take the course.

Redirect examination.

By Mr. Franklin:

I never heard the word atheist around the school at all before this case came up.

Recross-examination.

By Mr. Chapman:

I do not hear all the words that have been used around the school. I heard the word here this afternoon.

BERGEN PARKHILL, called as a witness on behalf of intervenors and defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Franklin:

My name is Bergen Parkhill, 1203 West Williams. I am 11 years old. I go to South Side School. I am in 6th grade, the same as James Terry. I have known him since 3d grade. I did not take religious education in the 4th grade. When the other children were taking religious education I left the room to study. I went to the recess room, which is [fol. 335] just above the hallway; just chairs and a telephone. The room is used by teachers.

There were 4 or 5 who did not take religious education, including James Terry. No one questioned me about why I did not take religious education that year; no one tried to tease or kid me about it; no one asked what religion I believed in or did not believe in. I did not take the courses because my mother thought I knew more from study in my kind of Sunday school every Sunday. My not taking part in these classes did not cause me any embarrassment.

Cross-examination.

By Mr. Chapman:

My not taking it gave me more time to do other work. If I had any checking up, like arithmetic, I got a chance to get it done. I could use this half hour to catch up, so I saved half an hour that way. I am taking religious education now, not because I do not feel that I need so much time for my other work now. I do not believe James Terry took it during the last half of the 6th grade, either.

When I went to the rest room the 4th grade teacher went with me. Miss Chapin took her class while she was not there. The rest room had desks, a table, davenport, chairs and tables. There were not enough chairs for all of us. There were two desk chairs and two rocking chairs, and you could sit on the davenport. The teacher took one rocking chair and that left enough chairs for the rest of us. Some had to sit on the davenport.

While we were sitting, those that had to sit on the davenport did not have a desk. They wrote on the tablets or their books and read.

When I did not take religious education courses no other boys teased me about it. I go to the Presbyterian church. [fol. 336] Most of my friends have religious ideas about the same as mine. Most of the people I know in school do.

Redirect examination.

By Mr. Franklin:

They do not talk about religion and religious beliefs around the school. I did not have occasion to tell anyone around the school that I was a Presbyterian. I had no occasion to ask James Terry what he was. I do not know whether or not his religious beliefs are different from mine, just what I have heard here in court.

Recross-examination.

By Mr. Chapman:

I have good Presbyterian friends who did not attend the same school. I have Methodist friends and Baptist friends. I do not believe any are Unitarians that I know of. I believe some believe in the Christian church.

PETER LANDRUM, called as a witness on behalf of intervenors and defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Franklin:

My name is Peter Landrum, 1014 West Charles. I am 11 years old, in 6th grade at South Side School. I know James Terry McCollum. He has been in my class in 4th and 5th grade. I did not take religious education in 4th grade. James Terry McCollum did not. Those of us who did not take the religious education class went to the rest room while the others were taking the class. James Terry went with us. I did not feel any different toward the people who took the religious education classes than if they had not taken them. I had friends among those who took the [fol. 337] courses. I did not lose any friends as a result of them. I never felt bothered or embarrassed because some

took the course and some did not. I felt that I was taken care of while the others took the courses. No one ever asked me why I did not take the courses nor what my church was or my religious beliefs. I first heard the word atheist when this trial came on; I did not hear it around the school. I did not hear them call James names or anything about his religion. I did not know at school when I was in 4th grade that James did not believe in God; we did not talk about it at all.

Cross-examination.

By Mr. Chapman:

I attend the Methodist church. At school I have Methodist friends and Protestant friends, and some who are members of the Christian church. I have an atheist friend, Terry.

I heard Bergen Parkhill describe the rest room. It was true. I had a desk in my regular room but not in the rest room.

ELWIN EUGENE MILLER, called as a witness on behalf of intervenors and defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Franklin:

My name is Elwin Eugene Miller, 1019 West White. I am 11 years old and have been at Dr. Howard's School 2 years. I started at the beginning of 5th grade. I was new in the school then. That was the same grade as James Terry McCollum was in. I was in his class and met him about that time. I did not know him before that.

I did not take the course in religious education that first [fol. 338] semester. James McCollum did not, either. We were the only 2 not taking it the first half of this year. One boy asked me why I wasn't in there and I said, "I will take —this end of the semester." That is all I said. That is all that was said about it by anyone. I don't remember Mrs. Taylor ever saying she would like her class to be 100% in religious education or anything like that. She never told me and James Terry McCollum while we were together

that she wished would both take religious education so it would be 100%. I never saw or heard any of the boys make fun of James in any way for not taking religious education. I don't know if they ever asked him why he did not take it or bother him in any way.

I made some friends in that first half of the year in the class and got acquainted with all the other children in the class. I did not seem to have difficulty making friends. No one seemed to hold it against me that I was not taking religious education. When the rest of the children were taking religious education we went into the music room and studied. I managed to keep pretty busy during that time. I got along with my work all right. I did not feel that I caught up with my arithmetic the first half of the year. I caught up during the rest of the year. The second half of the year I took the religious education class. It did not interfere with my school work, I was able to keep up.

Cross-examination.

By Mr. Chapman:

I was a little behind with my work when I first started in and for that reason I did not take religious education. But having this half hour to study other subjects it gave me a chance to catch up. I don't remember Mrs. Taylor saying I could take religious education as soon as I caught [fol. 339] up. I did not tell her that I would take it when I got caught up. My parents did not sign the card when it was sent out. I took it home and carried it back unsigned. My parents knew I was a little behind to start with. I did not want them to sign because I thought that I could not. I used my own mind about that. I did not have any kind of religion that was very much different from most of the children. I go to the Baptist church. There are others in that class that are friends of mine that go to the Baptist church. I don't know if any of my friends in that class are Presbyterians; some are Methodist. I don't know if any of my friends are members of the Christian Church. None go to the Lutheran or the Episcopalian Church. I don't know if any are atheists.

I knew 2 or 3 days ago that I was going to testify. Mr. Franklin called on the telephone. I didn't talk to him. My mother spoke to me about coming over. She did not tell me what I was going to testify about. She told me what

kind of a case it was. She said it was about God. I did not talk to anybody else about it after that. I talked to Mr. Franklin about it yesterday, not today. I have not been here very long today, just came in a few minutes ago. I was in school this morning and afternoon.

I am now in the Dr. Howard school, in the 6th grade. I signed up for religious education this year. My teacher is Mrs. Kincaid. I do not know what church she belongs to.

Redirect examination.

By Mr. Franklin:

I never felt embarrassed as a result of these religious education classes while in school. I did not find it any easier to make friends with the other children when I took [fol. 340] religious education than when I did not. I made friends with all of them before I got around to the religious education classes. The children never discussed around the school or in the classroom or anywhere else on the premises the religions the various children had.

I first heard the word atheist when this case began, never around the schools. I never heard anyone call James Terry McCollum an atheist. I never heard anyone discuss his beliefs one way or the other. I never heard anyone say, "James Terry McCollum does not believe in God," or anything like that.

Recross-examination.

By Mr. Chapman:

I have about the same religious ideas as the other children in my class. I don't know that I have about the same religious ideas that Terry has.

(Whereupon Defendant's Exhibit 301 was offered and received in evidence without objection.)

Relator's Exhibit 3, Defendant's Exhibit 301, being a receipt dated June 12, 1945, signed by J. A. Burke, township treasurer, for $627.28 from Carrie Busey, including an item "Miss Chapin, religious inst. $1.05."

Whereupon defendant rested.

Whereupon Intervenors rested.

Whereupon the Relator offered the following additional evidence in rebuttal:

[fol. 341] EUGENE HARVEY MELLON, having been previously sworn, called as a witness on behalf of relator in rebuttal, testified as follows:

Direct examination.

By Mr. Chapman:

I testified that as far as I knew at the Dr. Howard School the religious education teacher did most of the teaching in that building in one day; I did not know her schedule. I did say it was between 9 o'clock in the morning and 5 in the afternoon. I think each day she went to a different school.

Q. How many grade schools are there in Champaign?

Mr. Franklin: Objection as not proper rebuttal.

The Court: I am inclined to think you are right but I will hear it.

The Witness (Continuing): There are 10 grade schools. As far as I know the teaching in all grades is between the hours of 9 in the morning and 5 in the afternoon.

Whereupon the Relator rested.

RENEWAL OF MOTION TO DISMISS

Mr. Franklin: We renew our motion to dismiss the complaint heretofore filed at the conclusion of the plaintiff's case.

The Court: We will take the motion with the case. The same ruling applies to the intervenors.

Argument by Mr. Chapman on behalf of Relator.

Date set for submitting briefs.

Statement by the court, not abstracted.

Opinion of the court, and decision. (Not abstracted; appears *ante*, pp. 76-115.)

Certificate of court reporter.

[fol. 342] Certificate of court to report of proceedings, dated March 26, 1946.

Certificate of clerk of Circuit Court that the foregoing is a full, true and correct transcript of record, dated April 1, 1946.

Respectfully submitted, Milton T. Raynor, Attorney for Appellant.

Walter F. Dodd, Of Counsel.

[fol. 343] IN SUPREME COURT OF ILLINOIS

Docket No. 29678—Agenda 27—November, 1946

THE PEOPLE ex rel. VASHTI McCOLLUM, Appellant,

v.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, Appellee

OPINION—January 22, 1947

Mr. Justice Thompson delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of Champaign county denying a writ of *mandamus* as petitioned for by Vashti McCollum, the relator and plaintiff, a resident and taxpayer in Champaign School District No. 71, who seeks to prohibit the teaching of religious education in the public schools during the hours when the public schools are regularly in session. The defendant school district includes all of the schools and school buildings in the city of Champaign. Special motions to quash the summons and dismiss the petition on limited appearance of the defendant were overruled. Answer being filed, and after intervening petitions and reply thereto, the cause by agreement was heard before the three judges of the sixth judicial circuit, sitting *en banc*, for the purpose of determining the disputed questions of fact and law involved in the case.

The record discloses that in the fall of 1940 the Champaign Council of Religious Education, a voluntary association of Jewish, Roman Catholic and Protestant faiths, was formed. They immediately sought and secured from the board of education of Champaign School District No. 71, permission to offer classes in religious education in grades four through nine. Qualified instructors, all materials and books, as well as incidentals, were to be furnished at the expense of the council. Admission to the classes was to be allowed only upon the express written request of parents, and then only to classes designated by the parents. They were to be excused by the board from attendance in the grade schools for thirty minutes and from the junior high school for a period of forty-five minutes in each week for participation in the religious education classes. Classes were to be scheduled so as not to interfere with the regular public-school classes after consultation with the public-school

teacher. Each faith—Catholic, Jewish and Protestant, was to have its separate instructional classes and no expense in connection with the classes was to be borne by the board. Additional groups were to be freely permitted to participate upon the same terms. Lesson materials and curriculum [fol. 344] were to be selected by a committee representative of all groups participating and in a manner to avoid any offensive, doctrinal, dogmatic or sectarian teaching. It is apparent the teaching was to be of the content of the Bible without interpretation or attempt at influencing belief in the doctrines or creeds of any church.

James Terry McCollum, the son of the relator, around whom this controversy centers, entered the fourth grade of the district school in the fall of 1943, and along with five others did not participate in the religious education classes during the first semester. He did, however, participate with his mother's consent during the second semester. In the fall of 1944 he transferred from the South Side School at his mother's request and enrolled in the fifth grade in the Doctor Howard School, and, with one other youngster, Elwin Miller, did not attend the religious education class the first semester. During the second semester he was alone in not participating therein. When other members of his class were attending the religious education classes he continued his regular studies in the music room under the supervision of his regular teacher. On one occasion he was placed at a desk in the hall where apparently he was teased by passing children who thought he was being punished. On complaint of his mother, this practice was promptly and permanently discontinued, as was that of placing him in the music room, when his mother claimed he was a victim of claustrophobia.

The record further discloses that the teachers conducting the religious classes were not teachers in the public schools but were subject to the approval and supervision of the superintendent. The courses in religious education were conducted in the regular teaching rooms in the public-school building, which were temporarily turned over to the religious-education teachers, and the classes were held during the school hours. They covered a period of thirty minutes of each week in the 4th, 5th, and 6th grades and fifty minutes each week in the 7th, 8th, and 9th grades of the junior high school. Cards were distributed to the parents of elementary students by the public-school teachers requesting them to indicate whether they desired their children to receive religi-

ous education. After being filled out, the cards were returned to the teachers of religious education classes either by the public-school teachers or the children. Separate rooms for Catholics, Jews and Protestants were provided [fol. 345] for religious instruction away from those who did not desire to participate.

At the opening of the trial, an intervening petition was filed by Elmer C. Bash and his wife, citizens and taxpayers residing in the school district, alleging that they are the parents of two minor children who attend the district school; that they are members of the University Place Christian Church, located in the community, and that they desire the classes in religious education, complained of by the relator, to continue; and allege that under the first and fourteenth amendments to the constitution of the United States, and under the constitution of the State of Illinois, they have the right to direct the education of their children, and prayed for the dismissal of the relator's petition. No objection was made to the filing of this petition, but the relator filed a reply thereto praying strict proof, and denying that intervenors' children are entitled to attend the classes of religious education and that they have any constitutional rights as alleged in the intervening petition. This petition was not referred to in the trial court because the court was of the opinion that the case could be disposed of on the complaint for *mandamus*, the answer thereto and the evidence heard in regard to the same.

The errors relied upon by the relator for reversal are: (1) The segregation of public-school pupils into sectarian groups for the purpose of instruction in a public school is violative of Federal and State constitutional guaranties of freedom of religion,—the fourteenth amendment to the Federal constitution and section 3 of article II and section 3 of article VIII of the constitution of Illinois. (2) The use of public funds for sectarian education violates section 3 of article II and section 3 of article VIII of the constitution of Illinois, and section 15-14 of the School Code of Illinois. (3) Sectarian teaching of public-school students in public-school buildings during school hours is violative of section 6-43 of the School Code of Illinois. (4) The discretion of an administrative body and officer in this case is violative of section 2 of article II and article III of the constitution of Illinois, and is a violation of the guaranties of due process

of law and equal protection of laws by the fourteenth amendment to the constitution of the United States.

It was defendant's contention that the judgment of the trial court should be affirmed because: (1) The authority of the board of education to release pupils from public-school studies for a period each week in order that they [fol. 346] may take religious studies is established by the recent case of *People ex rel. Latimer* v. *Board of Education*, 394 Ill. 228, 68 N. E. 2d 305. (2) The defendant has the statutory power, subject to the constitutional provisions here involved, to permit the use of schoolrooms for religious education when they are not actually being used for public-school purposes, even though other portions of the building are then being used for public-school classes. (3) No constitutional provision is violated by the facts shown in this record because the plan is voluntary and no one's religious freedom is infringed, and because there is no appropriation, donation or payment of public money in aid of a sectarian purpose. The use of the school building is a mere incidental aid to religion which this court long ago approved. *Nichols* v. *School Directors*, 93 Ill. 61.

It is first contended by relator, on her assignment of errors, that the segregation of public-school pupils into sectarian groups for the purpose of instruction in a public school is violative of Federal and State constitutional guaranties of freedom of religion as provided in the fourteenth amendment to the Federal constitution, and section 3 of article II and section 3 of article VIII of the constitution of Illinois. It is particularly urged that the plan of the school district of providing religious instruction for three groups, —Catholic, Jewish and Protestant,—through distribution of cards or schedules for voluntary registration, with provision of public schoolroom and of school-time periods for such instruction, is obnoxious to the constitutional guaranties; that while the program is voluntary it results in segregation and embarrassment to those not participating, which amounts to interference with their religious freedom.

Relator places great reliance upon the case of *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, and quotes from page 351: "The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a dis-

advantage in the school, which the law never contemplated."

We do not think it necessary, in the consideration of this case, to make an extended analysis of the particular situation as it existed in the *Ring* case, which is plainly dissimilar from the facts as they exist in this case. What was said [fol. 347] there in the majority, as well as in the dissenting opinion, presents a lengthy discourse as to religion, its origin, various forms of worship, the versions of the scripture, and setting forth the historical and literary features of the Bible from the early Hebrew to the present generation. It is there for perusal as the divergent views of the court. Briefly, the facts there reveal three public schools were maintained in District No. 24, Scott County, in accordance with the statute of Illinois. The school opened in the morning with religious exercises which consisted of scripture reading from the King James version of the Bible, repeating of the King James version of the Lord's prayer while standing with bowed heads, and the singing of Protestant hymns. These exercises were conducted by the teacher in opening school and the participation was compulsory. A number of children attending the school were of the Roman Catholic faith and the parents, who were Roman Catholics, contended that the compulsory participation of the pupils deprived them of the freedom of worship guaranteed by the constitution. It can readily be seen that the exercises as conducted there were part of the public-school program carried on while the children participating were in attendance in the public-school classes. The exercises complained of were actually worship services, including the Lord's prayer, the singing of hymns, and the participation in the exercises was compulsory.

In the instant case, the religous education classes are voluntary and are not a part of the public-school program, and pupils are excused from their public-school classes while attending the classes in religious education. The religious education courses do not go to the extent of being worship services and do not include prayers or the singing of hymns. It might be further added that the classes are conducted by teachers employed by the church organization and all expenses in connection therewith are born by such organization. The dissimilarity is easily distinguished.

Many cases from foreign jurisdictions are cited but, in the main, they are dissimiliar, and do not concern a volun-

tary system and are lacking in equality of denominations. The case of *Harfst* v. *Hoegen*, 349 Mo. 808, 163, S. W. 2d 609, 141 A. L. R. 1136, is cited and it is urged it supports the *Ring case*. While it is true some support is suggested with respect to a Catholic service, and the possibilities of a non-Catholic being excused, the case is circumscribed by the Missouri constitution. It was held there, under entirely [fol. 348] different facts, that a parochial school could not be maintained at public expense or that teachers of religion could not be paid from public-school funds. To point out the dissimiliarity of the many cases cited would unnecessarily extend this opinion.

We recently held, in the case of *People ex rel. Latimer* v. *Board of Education*, 394 Ill. 228, that a voluntary program of religious education which permitted the superintendent of schools to excuse public-school children at the request of their parents for one hour each week for the purpose of attending religious education classes at places outside of the school activities or property, did not violate the American principle of separating church and State, and did not violate the first amendment to the constitution of the United States which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" and did not violate the fourteenth amendment to the same constitution providing that no State shall make or enforce any law which deprives any person of life, liberty or property, without due process of law, or which denies to any person within its jurisdiction the equal protection of the laws. This court there further denied that such action violated a similar section of the Illinois constitution, being section 2 of article II; and further denied there was a violation of sections 1 and 3 of article VIII of the same constitution, which require the General Assembly to provide a thorough and efficient system of free schools and that no public corporation shall make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose; and denied the contention of petitioners in reliance upon section 3 of article II, reading as follows: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his religious

opinions. * * * No person shall be required to attend or support any ministry or place of worship aga-nst his consent, nor shall any preference be given by law to any religious denomination or mode of worship."

It is apparent the program as adopted in the *Latimer case* was to all intents and purposes exactly the same as that involved in the instant case, excepting only that the classes were held outside of the schoolrooms. As to the classes being held in the schoolrooms, they were not held [fol. 349] in the presence of anyone who did not desire to participate therein, and those remaining were assigned to other rooms and continued with their class studies.

It is contended by appellant in the instant case that, in arranging the classes for religious instruction consisting of Protestants, Catholics and Jews, the readjustment of these groups from room to room is necessarily known to the members and those of each group must know who are members of each other group. The *Ring case* is cited in support of the proposition that the exclusion of a pupil from this part of the school exercises puts him in a class by himself and subjects him to a stigma. We hardly see the difference in this respect as to the situation in the *Latimer case*, above referred to, where groups were excused for one hour each week during the regular school period for the purpose of attending religious education classes at places outside of the school property and thereafter returned to the public-school room. The same might be said there that those remaining were subjected to a stigma. That appellant's son was so subjected is refuted by appellant's own testimony wherein she testified, "As for religious education in the public schools, it would not have a bad effect upon Terry [meaning her son]. I do not know it would bother him one way or the other. I did not know it until in court."

It is next contended the use of public funds for sectarian education violates section 3 of article II and section 3 of article VIII of the constitution, and section 15-14 of the School Code of Illinois. It is pointed out that the question is one as to whether any public funds were expended, or any grant or donation of land, money or other personal property made (1) in the additional use of school buildings for independent religious instruction "while they are being used by students;" (2) in the additional services of public-school teachers and the frequent movement of

students from room to room; or (3) in printing or other expenses involved in the additional function of religious instruction. As to this, we find the classes were held in the schoolrooms during the current school period and the rooms were in use during the entire period, and, no doubt, the same cost for lights, heat, janitor service, etc., would exist whether or not the schoolroom was used at the particular time by this particular class. Any additional wear and tear on the floors would seem to be inconsequential. The trial court unanimously found as facts that there was no direct appropriation of any kind or direct expenditures of [fol. 350] money of any kind for or on behalf of said religious education classes. Any additional wear and tear of furniture due to the religious education classes, so far as the evidence in this case discloses, would be negligible. This, of course, resolved the question of fact against appellant.

The appellant urges this is a question of law as to whether public funds have been used to such an extent as to violate section 3 of article II and section 3 of article VIII of the constitution of Illinois. In the case of *Nichols v. School Directors*, 93 Ill. 61, this court held that permission to hold stated meetings for religious purposes in the schoolhouse did not compel a taxpayer to aid in supporting a house of worship in violation of the above constitutional restraints. As the court there aptly said, "It seems to us a very strained interpretation to attempt to bring the present case within the reach of either one of the above constitutional provisions." The court there further said, "Religion and religious worship are not so placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the State." This decision has been cited and followed by this court in a number of cases. It is our judgment the incidental expenses that might occur here are not in violation of the constitutional restraints insisted upon. *De minimis non curat lex.*

It is next contended that sectarian teaching of public-school students in public-school buildings durings school hours is violative of section 6-43 of the School Code. (Ill. Rev. Stat. 1945, chap. 122, par. 6-43.) Under this section the following power is conferred upon school directors: "To have the control and supervision of all public

schoolhouses in their district, and to grant the temporary use of them, when not occupied by schools, for religious meetings and Sunday schools, for evening schools and literary societies, and for such other meetings as the directors deem proper; to grant the use of assembly halls and class rooms when not otherwise needed, including light, heat and attendants, for public lectures, concerts, and other educational and social interests, under such provisions and control as they may see fit to impose and to conduct, or provide for the conducting of recreational, social and civic activities in the school buildings." That part of the statute beginning with the words "to grant the [fol. 351] use" and concluding with the word "buildings," was added by the amendment of 1915, and appellant cites the case of *Lagow* v. *Hill*, 238 Ill. 428, which case was decided in 1909, before that amendment. In the *Lagow case* a taxpayer of the school district filed a bill in equity to restrain the board of school directors from permitting certain fraternal organizations to hold meetings in one room of the school building in said district. The evidence there disclosed that the schoolhouse, a two-story brick building, consisted of two rooms downstairs, and a large assembly room and a small room designed as an office for the superintendent on the upper floor. No part of the second floor at the time this suit was filed was being used for school purposes, the rooms on the first floor affording ample accommodation for the classes. It was contended by the taxpayer that the board of directors had exceeded their statutory powers in permitting the temporary use of the second floor by certain fraternal organizations. The evidence discloses that the school directors, for a consideration, permitted the Modern Woodmen and other fraternal organizations to hold meetings in the upper room. A number of teachers testified that the holding of these meetings in no way disturbed or interrupted the school. This court there held the statute clearly gave the board of directors the power in their discretion to grant the use of the school building or such part thereof as was not occupied by the school, for any meeting which the board deemed proper. This holding was based on the evidence of the teachers who testified that holding these meetings in no way disturbed or interrupted the schools.

We find, in the instant case, a teacher in the schools for sixteen years was called as a witness for appellant.

She testified: "In the bulletin we are advised that the religious education teacher will appear in the building prior to 8:30, the official school time; that is when the first bell rings, to confer with the principal and teachers as to the time they find it will fit best into their program, so that it will in no way interfere with the regular secular subjects." She further testified: "Our program is flexible. We do not teach a subject according to the minutes of the day and hour. We are teaching subject matter, not time. A class or a subject is never omitted even though thirty minutes out of the fifty-minute arithmetic class might be taken on Monday morning. There is fifty minutes of time in the week about which there is no provision for use in [fol. 352] the public-school course. If thirty minutes is used for religious education there is still twenty minutes of unassigned time." From this, we are able to discern that these classes as arranged caused but very little, if any, disturbance and no interruption as to classes. This was the import of the holding in the *Lagow case* as cited by appellant. Under such circumstances as detailed here in the conduct of the schools and the method of holding the classes, the contention that the board of education exceeded its statutory powers is not tenable. Questions of policy are solely for the determination of the board, and when they have once been determined by it the courts will not inquire into their propriety. (*People ex rel. Fursman* v. *City of Chicago*, 278 Ill. 318.) Courts will not interfere with the judgment of the board unless by an arbitrary and discriminatory action it abuses the power granted. *Segar* v. *Board of Education*, 317 Ill. 418.

It is admitted by appellant that a school board has a wide discretion in the exercise of its powers; (*Board of School Inspectors* v. *People ex rel. Grove*, 20 Ill. 526; *Wilson* v. *Board of Education*, 2[illegible] Ill. 464; *People ex rel. Fursman* v. *City of Chicago*, 278 Ill. 318, *Segar* v. *Board of Education*, 317 Ill. 418;) but it is contended the discretion which may be exercised is that within powers conferred by the statute; that the board of education cannot exercise any power except in the manner provided by statute. *Carter Oil Co.* v. *Liggett*, 371 Ill. 482.

It is, of course, true the board of education cannot exercise any power except in the manner provided in the statute, but that always presents the difficult question as to whether or not, under the existing facts, it has im-

properly exercised a power not in any manner provided by such statute. Apparently, the board here had worked out a plan for religious education classes and by the plan it was not necessary for the schoolroom to be occupied for any other purpose at that particular time. Further, these classes were so arranged as not to conflict with others. This arrangement, coupled with the rule that courts will not interfere with the judgment of the board unless it has abused the powers granted, would not seem to be a violation of the power which the board was permitted to exercise.

It is urged by appellant that as the power is vested in school boards by the Illinois statutes, (Ill. Rev. Stat. 1945, chap. 122, par. 6-43,) to grant the temporary use of schoolhouses when not occupied by schools, for religious meet- [fol. 353] ings and Sunday schools, no authority is granted to choose sects or dominations, and, in the absence of such authority, there would be an equal duty to all applicants; that the existence of a discretion, either by grant or implication, would invalidate the statute as violative of section 2 of article II and article III of the constitution of Illinois, and as violative of the fourteenth amendment to the constitution of the United States. It is true that if the power is clearly legislative in nature and exclusively belongs to the legislative department of the government, its delegation by the legislature would be unconstitutional; but in sustaining grants of power the courts have been guided considerably by considerations of expediency. They have recognized that a certain degree of deliberation is essential to the efficient and effective operation of the government, and that in some situations the legislature must leave to the executive officers and administrative boards the duty of carrying out the mandate of the statute. As heretofore pointed out, school boards have a wide discretion in the exercise of powers conferred upon them, and the courts will not interfere with the judgment of the board unless by an arbitrary and discretionary action the powers granted are abused. As to the particular point that no authority is granted to choose sects, there was no choice here on the part of the board.

Aside from the fact that the question of discretion amounting to delegation of legislative power was not raised in any manner in the trial court, it does not appear from this record, including the testimony as referred to in appel-

lant's brief, that there was any arbitrary and discretionary action by the board of the particular powers granted. Appellant's contention in this respect cannot be maintained.

We have the record here, which, relieved of its excess verbiage, technicalities and niceties, presents the simple question, does either the Federal or State constitution, or both, in their guaranty of religious freedom, prohibit voluntary religious classes in the public schools under the plan as disclosed by this record? Certainly, such classes do not violate the freedom of conscience of any individual or group so long as the classes are conducted upon a purely voluntary basis. Freedom of religion as intended by those [fol. 354] who wrote the State and Federal constitutions means the right of an individual to entertain any desired religious belief without interference from the State. Our government very wisely refuses to recognize a specific religion, but this cannot mean that the government does not recognize or subscribe to religious ideals. We find such recognition in the very preamble of our State constitution. The government does not recognize a particular faith but this does not mean that it is indifferent to religious faith. To deny the existence of religious motivation is to deny the inspiration and authority of the constitution itself.

We do not find, from this voluminous record, anything that would warrant us in finding that there has been any violation of State and Federal guaranties, or, under the system as outlined, a violation of section 6-43 of the School Code of Illinois.

For the reasons heretofore announced, the judgment of the circuit court is affirmed.

Judgment affirmed.

[fol. 355] IN SUPREME COURT OF ILLINOIS

No. 29678

PEOPLE STATE OF ILLINOIS ex rel. VASHTI McCOLLUM, Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NUMBER 71, CHAMPAIGN COUNTY, ILLINOIS, et al., Appellees

Appeal from Circuit Court, Champaign County, 18101

JUDGMENT—January 22, 1947

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Champaign County aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellees recover of and from the said appellant costs by them in this behalf expended, to be taxed, and that they have execution therefor.

[fol. 355a] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed April 18, 1947

To the Honorable Walter T. Gunn, Chief Justice of the Supreme Court of the State of Illinois:

Your petitioner, Appellant in the above-entitled cause and relator in the mandamus action of the same title in the Circuit Court of Champaign County, Illinois and in the

Supreme Court of Illinois, considering herself aggrieved by the final decision and judgment of the Supreme Court of Illinois, entered on the 7th day of February, 1947, in the said cause last mentioned, desires that an appeal be allowed to the Supreme Court of the United States and for other and further relief. She avers that this case draws in question the validity of a statute of the State of Illinois on the ground of its being repugnant to the constitution of the United States, and that the decision of the state court has been in favor of its validity; a statute of the State of Illinois being herein involved in that a public school system is pro-
[fol. 356] vided by the constitution of the State of Illinois; the board of directors which is Appellee herein and all other such boards are authorized "to adopt and enforce all necessary rules and regulations for the management and government of the public schools in their district"; and the decision of the state court has been in favor of the validity of regulations and rules of such local body which constitute exertions of the state law making power. The Supreme Court of the United States therefore has jurisdiction of this appeal. Judicial Code, Section 237 (a), as amended; 28 U. S. Code(Sec. 344 (a).

Assignment of Errors

Appellant assigns the following errors in the record proceedings in this case:

1. The Supreme Court of Illinois erred in sustaining a plan of religious education in public schools which deprives of due process of law and denies equal protection of *of* the laws, through a law "respecting an establishment of religion and prohibiting the free exercise thereof," in violation of the Fourteenth Amendment; such plan applying to participating and non-participating sectarian groups and also to those who accept no creed, with the public expense borne equally by taxpayers of all such groups. The Supreme Court of Illinois denies a freedom of religion which is common to all and as to which all must be treated equally.

2. The Supreme Court of Illinois erred in sustaining a plan segregating public school pupils into sectarian groups for religious education, with a separate segregation of those
[fol. 357] refusing to join in such education, such plan being violative of the Fourteenth Amendment to the Constitution

of the United States. Such plan violates the constitutional guarantee of freedom of religion; encourages the creation and friction of sectarian groups in the public schools; forces the segregation of non-religious groups; and places a majority or dominant religious group in a controlling position in the public school system, which requires compulsory attendance except where there is attendance at a private or parochial school having designated standards.

3. The Supreme Court of Illinois erred in sustaining a discretion vested in an administrative body and officer to determine (1) what sectarian groups should be permitted to teach public school pupils in the public school buildings and during school hours; (2) the character of religious teachers of such groups; and (3) the material to be taught; such discretionary powers in religious education in the public schools being in violation of the guarantees of due process of law and of equal protection of the laws of the Fourteenth Amendment to the Constitution of the United States.

Prayer for Reversal

Wherefore, your petitioner prays:

1. That an appeal be allowed herein from the Supreme Court of the State of Illinois to the Supreme Court of the United States, to the end that said judgment of the Supreme Court of Illinois, dated February 7, 1947, may be reversed and judgment rendered in favor of said appellant, and for costs.

[fol. 358] 2. That the amount of cost bond to be given by Appellant be fixed.

3. That citation issue to the Appellee named above.

4. For such other and further relief to which Appellant may be entitled.

Respectfully submitted, Walter F. Dodd, Attorney for Appellant.

[fol. 359] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 18, 1947

The appellant in the above entitled cause having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled cause by the Supreme Court of Illinois on the 7th day of February, 1947, and from each and every part thereof, and having presented and filed her petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statutes of the United States and the rules of the Supreme Court of the United States, in such case made and provided:

It is now Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Illinois in the above-entitled cause, as is provided by law; and

It is further Ordered that the Clerk of the Supreme Court of Illinois shall prepare and certify a transcript of the [fol. 360] record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within forty days of this date, and

It is further Ordered that security for costs on appeal be fixed in the sum of Five hundred dollars ($500).

Signed Walter T. Gunn, Chief Justice of the Supreme Court of Illinois.

Dated: Apr. 16, 1947.

[fol. 361] Citation in usual form showing service on Owen Rall omitted in printing.

[fol. 362] Cost bond on Appeal for $500.00 approved and filed April 18, 1947 omitted in printing.

[fol. 363] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO RECORD ON APPEAL—Filed April 21, 1947

It is hereby stipulated by and between the parties to the above entitled cause, by their respective counsel, that the record on appeal shall consist of the following:

1. The printed abstract of record submitted to the Supreme Court of Illinois in this case, such printed abstract of 342 pages being agreed to contain all that is material in the 1185 typewritten pages of proceedings in the trial court which would otherwise constitute a portion of the record to be transmitted to the Supreme Court of the United States.

2. Judgment entered by Supreme Court of Illinois.

3. Petition for appeal, with assignment of errors and prayer for appeal.

4. Jurisdictional statement, with the opinion of the Supreme Court of Illinois attached.

5. Order allowing appeal.

6. Proof of service within five days of petition for, and order allowing the appeal, together with a copy of the assignment of errors; the jurisdictional statement; and a statement directing attention to paragraph 3 of Rule 12 of the United States Supreme Court.

7. Citation, and proof of service.

8. Bond for costs.

9. Stipulation as to record.

Walter F. Dodd, Attorney for Appellant, John L. Franklin, A. R. Peterson and Owen Rall, Attorneys for Appellee.

[fol. 364] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 365] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND PARTS OF RECORD TO BE PRINTED—Filed May 22, 1947.

Appellant adopts her assignment of errors, constituting a part of petition for appeal, as a statement of the points upon which she intends to rely.

Appellant states that the entire record, as filed in the above entitled cause, is necessary for the consideration of the points relied upon.

Walter F. Dodd, 30 North LaSalle Street, Chicago, Illinois, Attorney for Appellant.

Due service and receipt of the foregoing statement of points to be relied upon and designation of the record to be printed is hereby acknowledged this 20th day of May, 1947.

A. R. Peterson, Owen Rall, J. L. Franklin, Attorneys for Appellees.

[fol. 365a] (File endorsement omitted.)

[fol. 366] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—June 2, 1947

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsed on Cover:] File No. 52,238 Illinois, Supreme Court, Term No. 90. People of the State of Illinois, ex rel., Vashti McCollum, Appellant vs. Board of Education of School District No. 71, Champaign County, Illinois, et al. Filed May 15, 1947. Term No. 90 O. T. 1947.

FILE COPY

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FILED
MAY 15 1947
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1374 90

PEOPLE OF THE STATE OF ILLINOIS, EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL, DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT AS TO JURISDICTION

WALTER F. DODD,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1374

PEOPLE OF THE STATE OF ILLINOIS, EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL, DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, AND ELMER C. BASH AND ALICE J. BASH, AND WANDA I. BASH, A MINOR, BY ELMER C. BASH, HER FATHER AND NEXT FRIEND,

Appellees

JURISDICTIONAL STATEMENT

MAY IT PLEASE THE COURT:

In support of the jurisdiction of this Court to review the above-entitled cause on appeal, Appellant respectfully represents:

(a) Statutory Provision Sustaining Jurisdiction

The appeal is within the jurisdiction of this Court under the terms of Section 237 of the Judicial Code (U. S. Code, Title 28, Sec. 344) which provides that a final judgment or

decree in any suit in the highest court of a state "where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal."

The action here is not one of a State legislature, but is the action of a local school board in permitting sectarian education in public school buildings during school hours and with the co-operation of the public school authorities and teachers. The constitution of Illinois requires a system of free schools (Art. VIII, Section 1); and by statute attendance of such schools is required of children between the ages of seven and sixteen with certain exceptions (Ill. Revised Statutes, 1945, Ch. 122, Sec. 26-1). The board of education is by statute authorized "to adopt and enforce all necessary rules and regulations for the management and government of the public schools in their district" (Illinois Revised Statutes, 1945, Ch. 122, Secs. 6-20, 7-6). Without formal rules and regulations the board of education permits religious education in the manner indicated above, and its action has been sustained by the Supreme Court of Illinois.

The jurisdictional issue is parallel with that in *Hamilton v. University of California*, 293 U. S. 245 (1934), in which an order of the regents of the University was the basis for an appeal to this Court, the Court saying at page 258:

> "The meaning of 'statute of any state' is not limited to acts of state legislatures. It is used to include every act legislative in character to which the state gives sanction, no distinction being made between acts of the state legislature and other exertions of the state law-making body."

The standard here created and supported by the Supreme Court of Illinois is legislative in character and the sustain-

ing of such a standard by the Supreme Court of Illinois makes it applicable to all school districts of the State. However, the fact that the present case applies it to only one school district does not defeat its statutory character. *King Mfg. Co.* v. *Augusta*, 277 U. S. 100 (1928).

(b) State Statute the Validity of Which Is Involved

As indicated above, this case does not involve the validity of an act of the state legislature, but the action of a local board of education which is held to be permitted by state legislation. The action of the board of education is stated as follows by the Supreme Court of Illinois:

> "The record discloses that in the fall of 1940 the Champaign Council of Religious Education, a voluntary association of Jewish, Roman Catholic and Protestant faiths, was formed. They immediately sought and secured from the board of education of Champaign School District No. 71, permission to offer classes in religious education in grades four through nine" (396 Ill., page 14).

The action of the board of education was not by formal rule or regulation, but merely by grant of permission which appears on the minutes of the board for June 6, 1940 (Record 164).

This case arises in a school district having a board of education such as is provided by statute for districts having not fewer than 1,000 and not more than 100,000 inhabitants. The powers and duties of such boards of education are the same as the powers and duties of boards of school directors in districts having fewer than 1,000 inhabitants. (Illinois Revised Statutes, 1945, Chap. 122, Section 7-6). One of the duties is:

> "To adopt and enforce all necessary rules for the management and government of the public schools of

their district" (Illinois Revised Statutes, 1945, Chap. 122, Section 6-20).

A power is granted

> "To have the control and supervision of all public schoolhouses in their district, and to grant the temporary use of them, when not occupied by schools, for religious meetings and Sunday schools, for evening schools and literary societies, and for such other meetings as the directors deem proper; to grant the use of assembly halls and class rooms when not otherwise needed, including light, heat and attendants, for public lectures, concerts, and other educational and social interests, under such provisions and control as they may see fit to impose and to conduct, or provide for the conducting of recreational, social and civic activities in the school buildings" (Illinois Revised Statutes, 1945, Chap. 122, Section 6-43).

The board of education of a city having a population exceeding 500,000 is authorized

> "To grant the use of assembly halls and class rooms when not otherwise needed, including light, heat and attendants, for free public lectures, concerts and other educational and social interests, free of charge, under such provisions and control as the board may prescribe" (Illinois Revised Statutes 1945, Chap. 122, Section 34-17, Paragraph 6).

Such a board is also empowered

> "To make suitable provision for the establishment and maintenance throughout the year or for such portion thereof as it may direct, not less than nine months, of schools of all grades and kinds" * * * (Illinois Revised Statutes, 1945, Chap. 122, Section 34-17, paragraph 1)

and it is provided that the board of education of such city shall

> "establish by-laws, rules and regulations, which shall have the force of ordinances for the proper mainte-

nance of a uniform system of discipline for both employees and pupils, and for the entire management of the schools" • • • (Illinois Revised Statutes, 1945, Chap. 122, Section 34-18).

The present case deals only with informal action, applicable to but one school district, but the same power exists in all school districts of the State of Illinois, and the result obtained by informal action in this case is comparable with that which is termed a regulation in *People* v. *Board of Education*, 394 Ill. 228, 68 N. E. 2d 305 (1946), which sustained a regulation of the Board of Education of the City of Chicago authorizing the superintendent of schools to excuse public school children at the request of their parents for one hour each week before the end of the regular school period for the purpose of attending religious educational classes at places outside of the school activities or properties. The action of the board of education in this case is that of a state law-making body, recognized as such by the Supreme Court of the State of Illinois. This Court has made it clear that the result rather than the method of attaining the result is controlling.

(c) Dates of Judgment and of Appeal

The opinion of the Supreme Court of Illinois in this case was filed on January 22, 1947, and the mandate was issued to the circuit court on February 7, 1947.

The application for appeal was presented to the Chief Justice of the Supreme Court of Illinois on the 16th day of April, 1947.

(d) Manner in Which Federal Questions Were Raised

In its opinion, which is attached hereto, the Supreme Court of Illinois states that the present case "presents the simple question, does either the federal or state constitu-

tion, or both, in their guarantee of religious freedom, prohibit voluntary religious classes in the public schools under the plan as disclosed by this record?" (396 Ill. 29).

This indicates that all federal issues were before that Court, which, however, also states that "the question of discretion amounting to delegation of legislative power was not raised in any manner in the trial court." This would appear to exclude the argument in that court upon the basis of *Cantwell* v. *Connecticut*, 310 U. S. 296, that censorship of religion is violative of the Fourteenth Amendment. The Supreme Court of Illinois also says that: "Questions of policy are solely for the determination of the board, and when they have once been determined by it the courts will not inquire into their propriety." And, in its opinion, the trial court said:

> "Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public school buildings such faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system" (Record 83).

Possible discriminations between religious groups or between religious and non-religious groups were alleged in paragraphs 40 and 41 of the complaint (Record 17, 18), and a substantial amount of evidence was introduced on this subject.

The proceeding in this case was initiated as an individual and taxpayer's action, and public expense for religious teaching in the public schools by sectarian groups was alleged to be violative of the Fourteenth Amendment (Record 5, 10, 12). This involves not only the equal protection of laws, but also the adoption into the Fourteenth Amendment of the clause of the First Amendment forbid-

ding any law "respecting an establishment of religion or prohibiting the free exercise thereof."

(e) The Questions Involved Are Substantial

The appeal in the present case presents to this Court for the first time the question as to the validity of sectarian religious education united with that of the public school; with the division of its pupils into sectarian or non-religious groups provided by the public school authorities. The plan in controversy involves religious education conducted by sectarian groups in the rooms of public school buildings during regular school hours, with the pupils usually having their religious education in their regular school rooms and in the presence of their public school teachers; with the places and times for the several sectarian groups designated by the public school officers or teachers, and with the assembly of such groups in the public schools under the supervision of the public school officers or teachers.

The Supreme Court of Illinois says that this system is valid because "conducted upon a purely voluntary basis" and that: "Admission to the classes was to be allowed only upon the express written request of parents and then only to classes designated by the parents." A card distributed by the public school authorities and which was to be returned to the school was termed a "Parent's Request Card," and asked permission for the pupil to attend a course in religious education. Yielding to solicitation is not altogether voluntary (Record 227). Appellant submits the question as to whether the non-religious or smaller sectarian groups may segregate themselves in the public schools "upon a purely voluntary basis."

Respectfully Submitted,

WALTER F. DODD,
Attorney for Appellant.

APPENDIX

Opinion

SUPREME COURT OF ILLINOIS

UNITED STATES OF AMERICA

STATE OF ILLINOIS,
Supreme Court, ss:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the 13th day of January, in the year of our Lord, one thousand nine hundred and forty-seven, within and for the State of Illinois.

Present: Walter T. Gunn, Chief Justice; Justice Clyde E. Stone, Justice Loren E. Murphy, Justice William J. Fulton, Justice Francis S. Wilson, Justice June C. Smith, Justice Charles H. Thompson; George F. Barrett, Attorney General; Harry G. Newman, Marshal; Attest: Earle Benjamin Searcy, Clerk.

Be It Remembered, that afterwards, to-wit, on the 22nd day of January, 1947, the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:

No. 29678

PEOPLE ex rel. VASHTI MCCOLLUM, *Appellant*,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, ET AL., *Appellees*

Appeal from Circuit Court Champaign County

Docket No. 29678—Agenda 27—November, 1946

THE PEOPLE *ex rel.* VASHTI MCCOLLUM, *Appellant*,

v.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, *Appellee*

Mr. JUSTICE THOMPSON delivered the opinion of the court:

This is an appeal from a judgment of the circuit court of Champaign county denying a writ of *mandamus* as

petitioned for by Vashti McCollum, the relator and plaintiff, a resident and taxpayer in Champaign School District No. 71, who seeks to prohibit the teaching of religious education in the public schools during the hours when the public schools are regularly in session. The defendant school district includes all of the schools and school buildings in the city of Champaign. Special motions to quash the summons and dismiss the petition on limited appearance of the defendant were overruled. Answer being filed, and after intervening petitions and reply thereto, the cause by agreement was heard before the three judges of the sixth judicial circuit, sitting en banc, for the purpose of determining the disputed questions of fact and law involved in the case.

The record discloses that in the fall of 1940 the Champaign Council of Religious Education, a voluntary association of Jewish, Roman Catholic and Protestant faiths, was formed. They immediately sought and secured from the board of education of Champaign School District No. 71, permission to offer classes in religious education in grades four through nine. Qualified instructors, all materials and books, as well as incidentals, were to be furnished at the expense of the council. Admission to the classes was to be allowed only upon the express written request of parents, and then only to classes designated by the parents. They were to be excused by the board from attendance in the grade schools for thirty minutes and from the junior high school for a period of forty-five minutes in each week for participation in the religious education classes. Classes were to be scheduled so as not to interfere with the regular public-school classes after consultation with the public-school teacher. Each faith—Catholic, Jewish and Protestant, was to have its separate instructional classes and no expense in connection with the classes was to be borne by the board. Additional groups were to be freely permitted to participate upon the same terms. Lesson materials and curriculum were to be selected by a committee representative of all groups participating and in a manner to avoid any offensive, doctrinal, dogmatic or sectarian teaching. It is apparent the teaching was to be of the content of the

Bible without interpretation or attempt at influencing belief in the doctrines or creeds of any church.

James Terry McCollum, the son of the relator, around whom this controversy centers, entered the fourth grade of the district school in the fall of 1943, and along with five others did not participate in the religious education classes during the first semester. He did, however, participate with his mother's consent during the second semester. In the fall of 1944 he transferred from the South Side School at his mother's request and enrolled in the fifth grade in the Doctor Howard School, and, with one other youngster, Elwin Miller, did not attend the religious education class the first semester. During the second semester he was alone in not participating therein. When other members of his class were attending the religious education classes he continued his regular studies in the music room under the supervision of his regular teacher. On one occasion he was placed at a desk in the hall where apparently he was teased by passing children who thought he was being punished. On complaint of his mother, this practice was promptly and permanently discontinued, as was that of placing him in the music room, when his mother claimed he was a victim of claustrophobia.

The record further discloses that the teachers conducting the religious classes were not teachers in the public schools but were subject to the approval and supervision of the superintendent. The courses in religious education were conducted in the regular teaching rooms in the public-school building, which were temporarily turned over to the religious-education teachers, and the classes were held during the school hours. They covered a period of thirty minutes of each week in the 4th, 5th, and 6th grades and fifty minutes each week in the 7th, 8th, and 9th grades of the junior high school. Cards were distributed to the parents of elementary students by the public-school teachers requesting them to indicate whether they desired their children to receive religious education. After being filled out, the cards were returned to the teachers of religious education classes either by the public-school teachers or the children. Separate rooms for Catholics, Jews and Protestants were

provided for religious instruction away from those who did not desire to participate.

At the opening of the trial, an intervening petition was filed by Elmer C. Bash and his wife, citizens and taxpayers residing in the school district, alleging that they are the parents of two minor children who attend the district school; that they are members of the University Place Christian Church, located in the community, and that they desire the classes in religious education, complained of by the relator, to continue; and allege that under the first and fourteenth amendments to the constitution of the United States, and under the constitution of the State of Illinois, they have the right to direct the education of their chidlren, and prayed for the dismissal of the relator's petition. No objection was made to the filing of this petition, but the relator filed a reply thereto praying strict proof, and denying that intervenors' children are entitled to attend the classes of religious education and that they have any constitutional rights as alleged in the intervening petition. This petition was not referred to in the trial court because the court was of the opinion that the case could be disposed of on the complaint for *mandamus*, the answer thereto and the evidence heard in regard to the same.

The errors relied upon by the relator for reversal are: (1) The segregation of public-school pupils into sectarian groups for the purpose of instruction in a public school is violative of Federal and State constitutional guaranties of freedom of religion,—the fourteenth amendment to the Federal constitution and section 3 of article II and section 3 of article VIII of the constitution of Illinois. (2) The use of public funds for sectarian education violates section 3 of article II and section 3 of article VIII of the constitution of Illinois, and section 15-14 of the School Code of Illinois. (3) Sectarian teaching of public-school students in public-school buildings during school hours is violative of section 6-43 of the School Code of Illinois. (4) The discretion of an administrative body and officer in this case is violative of section 2 of article II and article III of the constitution of Illinois, and is a violation of the guaranties of due process of law and equal protection of laws by the

fourteenth amendment to the constitution of the United States.

It was defendant's contention that the judgment of the trial court should be affirmed because: (1) The authority of the board of education to release pupils from public-school studies for a period each week in order that they may take religious studies is established by the recent case of *People ex rel. Latimer* v. *Board of Education*, 394 Ill. 228, 68 N. E. 2d 305. (2) The defendant has the statutory power, subject to the constitutional provisions here involved, to permit the use of schoolrooms for religious education when they are not actually being used for public-school purposes, even though other portions of the building are then being used for public-school classes. (3) No constitutional provision is violated by the facts shown in this record because the plan is voluntary and no one's religious freedom is infringed, and because there is no appropriation, donation or payment of public money in aid of a sectarian purpose. The use of the school building is a mere incidental aid to religion which this court long ago approved. *Nichols* v. *School Directors*, 93 Ill. 61.

It is first contended by relator, on her assignment of errors, that the segregation of public-school pupils into sectarian groups for the purpose of instruction in a public school is violative of Federal and State constitutional guaranties of freedom of religion as provided in the fourteenth amendment to the Feedral constitution, and section 3 of article II and section 3 of article VIII of the constitution of Illinois. It is particularly urged that the plan of the school district of providing religious instruction for three groups, —Catholic, Jewish and Protestant,—through distribution of cards or schedules for voluntary registration, with provision of public schoolroom and of school-time periods for such instruction, is obnoxious to the constitutional guaranties; that while the program is voluntary it results in segregation and embarrassment to those not participating, which amounts to interference with their religious freedom.

Relator places great reliance upon the case of *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, and quotes from page 351: "The exclusion of a pupil from this part of

the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated."

We do not think it necessary, in the consideration of this case, to make an extended analysis of the particular situation as it existed in the *Ring case*, which is plainly dissimilar from the facts as they exist in this case. What was said there in the majority, as well as in the dissenting opinion, presents a lengthy discourse as to religion, its origin, various forms of worship, the versions of the scripture, and setting forth the historical and literary features of the Bible from the early Hebrew to the present generation. It is there for perusal as the divergent views of the court. Briefly, the facts there reveal three public schools were maintained in District No. 24, Scott county, in accordance with the statute of Illinois. The school opened in the morning with religious exercises which consisted of scripture reading from the King James version of the Bible, repeating of the King James version of the Lord's prayer while standing with bowed heads, and the singing of Protestant hymns. These exercises were conducted by the teacher in opening school and the participation was compulsory. A number of children attending the school were of the Roman Catholic faith and the parents, who were Roman Catholics, contended that the compulsory participation of the pupils deprived them of the freedom of worship guaranteed by the constitution. It can readily be seen that the exercises as conducted there were part of the public-school program carried on while the children participating were in attendance in the public-school classes. The exercises complained of were actually worship services, including the Lord's prayer, the singing of hymns, and the participation in the exercises was compulsory.

In the instant case, the religious education classes are voluntary and are not a part of the public-school program, and pupils are excused from their public-school classes while attending the classes in religious education. The religious education courses do not go to the extent of being worship services and do not include prayers or the singing

of hymns. It might be further added that the classes are conducted by teachers employed by the church organization and all expenses in connection therewith are borne by such organization. The dissimilarity is easily distinguished.

Many cases from foreign jurisdictions are cited but, in the main, they are dissimilar, and do not concern a voluntary system and are lacking in equality of denominations. The case of *Harfst* v. *Hoegen*, 349 Mo. 808, 163 S. W. 2d 609, 141 A. L. R. 1136, is cited and it is urged it supports the *Ring case*. While it is true some support is suggested with respect to a Catholic service, and the possibilities of a non-Catholic being excused, the case is circumscribed by the Missouri constitution. It was held there, under entirely different facts, that a parochial school could not be maintained at public expense or that teachers of religion could not be paid from public-school funds. To point out the dissimilarity of the many cases cited would unnecessarily extend this opinion.

We recently held, in the case of *People ex rel. Latimer* v. *Board of Education*, 394 Ill. 228, that a voluntary program of religious education which permitted the superintendent of schools to excuse public-school children at the request of their parents for one hour each week for the purpose of attending religious education classes at places outside of the school activities or property, did not violate the American principle of separating church and State, and did not violate the first amendment to the constitution of the United States which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" and did not violate the fourteenth amendment to the same constitution providing that no State shall make or enforce any law which deprives any person of life, liberty or property, without due process of law, or which denies to any person within its jurisdiction the equal protection of the laws. This court there further denied that such action violated a similar section of the Illinois constitution, being section 2 of article II; and further denied there was a violation of sections 1 and 3 of article VIII of the same constitution, which require the General Assembly to provide a thorough and efficient

system of free schools and that no public corporation shall make any appropriation, or pay from any public fund whatever, anything in aid of any church or sectarian purpose; and denied the contention of petitioners in reliance upon section 3 of article II, reading as follows: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions. * * * No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."

It is apparent the program as adopted in the *Latimer case* was to all intents and purposes exactly the same as that involved in the instant case, excepting only that the classes were held outside of the schoolrooms. As to the classes being held in the schoolrooms, they were not held in the presence of anyone who did not desire to participate therein, and those remaining were assigned to other rooms and continued with their class studies.

It is contended by appellant in the instant case that, in arranging the classes for religious instruction consisting of Protestants, Catholics and Jews, the readjustment of these groups from room to room is necessarily known to the members and those of each group must know who are members of each other group. The *Ring case* is cited in support of the proposition that the exclusion of a pupil from this part of the school exercises puts him in a class by himself and subjects him to a stigma. We hardly see the difference in this respect as to the situation in the *Latimer case*, above referred to, where groups were excused for one hour each week during the regular school period for the purpose of attending religious education classes at places outside of the school property and thereafter returned to the public-school room. The same might be said there that those remaining were subjected to a stigma. That appellant's son was so subjected is refuted by appellant's own testimony wherein she testified, "As for religious education in the public schools, it would not have a bad effect upon Terry [meaning her son.] I do not know it would bother

him one way or the other. I did not know it until in court."

It is next contended the use of public funds for sectarian education violates section 3 of article II and section 3 of article VIII of the constitution, and section 15-14 of the School Code of Illinois. It is pointed out that the question is one as to whether any public funds were expended, or any grant or donation of land, money or other personal property made (1) in the additional use of school buildings for independent religious instruction "while they are being used by students;" (2) in the additional services of public-school teachers and the frequent movement of students from room to room; or (3) in printing or other expenses involved in the additional function of religious instruction. As to this, we find the classes were held in the schoolrooms during the current school period and the rooms were in use during the entire period, and, no doubt, the same cost for lights, heat, janitor service, etc., would exist whether or not the schoolroom was used at the particular time by this particular class. Any additional wear and tear on the floors would seem to be inconsequential. The trial court unanimously found as facts that there was no direct appropriation of any kind or direct expenditures of money of any kind for or on behalf of said religious education classes. Any additional wear and tear of furniture due to the religious education classes, so far as the evidence in this case discloses, would be negligible. This, of course, resolved the question of fact against appellant.

The appellant urges this is a question of law as to whether public funds have been used to such an extent as to violate section 3 of article II and section 3 of article VIII of the constitution of Illinois. In the case of *Nichols* v. *School Directors*, 93 Ill. 61, this court held that permission to hold stated meetings for religious purposes in the schoolhouse did not compel a taxpayer to aid in supporting a house of worship in violation of the above constitutional restraints. As the court there aptly said, "It seems to us a very strained interpretation to attempt to bring the present case within the reach of either one of the above constitutional provisions." The court there further said, "Religion and religious worship are not so placed under the ban of the constitution that they may not be allowed to become the

recipient of any incidental benefit whatsoever from the public bodies or authorities of the State." This decision has been cited and followed by this court in a number of cases. It is our judgment the incidental expenses that might occur here are not in violation of the constitutional restraints insisted upon. *De minimis non curat lex.*

It is next contended that sectarian teaching of public-school students in public-school buildings during school hours is violative of section 6-43 of the School Code. (Ill. Rev. Stat. 1945, chap. 122, par. 6-43.) Under this section the following power is conferred upon school directors: "To have the control and supervision of all public schoolhouses in their district, and to grant the temporary use of them, when not occupied by schools, for religious meetings and Sunday schools, for evening schools and literary societies, and for such other meetings as the directors deem proper; to grant the use of assembly halls and class rooms when not otherwise needed, including light, heat and attendants, for public lectures, concerts, and other educational and social interests, under such provisions and control as they may see fit to impose and to conduct, or provide for the conducting of recreational, social and civic activities in the school buildings." That part of the statute beginning with the words "to grant the use" and concluding with the word "buildings," was added by the amendment of 1915, and appellant cites the case of *Lagow* v. *Hill*, 238 Ill. 428, which case was decided in 1909, before that amendment. In the *Lagow case* a taxpayer of the school district filed a bill in equity to restrain the board of school directors from permitting certain fraternal organizations to hold meetings in one room of the school building in said district. The evidence there disclosed that the schoolhouse, a two-story brick building, consisted of two rooms downstairs, and a large assembly room and a small room designed as an office for the superintendent on the upper floor. No part of the second floor at the time this suit was filed was being used for school purposes, the rooms on the first floor affording ample accommodation for the classes. It was contended by the taxpayer that the board of directors had exceeded their statutory powers in permitting the temporary use of the second floor by certain fraternal organizations. The evi-

dence discloses that the school directors, for a consideration, permitted the Modern Woodmen and other fraternal organizations to hold meetings in the upper room. A number of teachers testified that the holding of these meetings in no way disturbed or interrupted the school. This court there held the statute clearly gave the board of directors the power in their discretion to grant the use of the school building or such part thereof as was not occupied by the school, for any meeting which the board deemed proper. This holding was based on the evidence of the teachers who testified that holding these meetings in no way disturbed or interrupted the schools.

We find, in the instant case, a teacher in the schools for sixteen years was called as a witness for appellant. She testified: "In the bulletin we are advised that the religious education teacher will appear in the building prior to 8:30, the official school time; that is when the first bell rings, to confer with the principal and teachers as to the time they find it will fit best into their program, so that it will in no way interfere with the regular secular subjects." She further testified: "Our program is flexible. We do not teach a subject according to the minutes of the day and hour. We are teaching subject matter, not time. A class or a subject is never omitted even though thirty minutes out of the fifty-minutes arithmetic class might be taken on Monday morning. There is fifty minutes of time in the week about which there is no provision for use in the public-school course. If thirty minutes is used for religious education there is still twenty minutes of unassigned time." From this, we are able to discern that these classes as arranged caused but very little, if any, disturbance and no interruption as to classes. This was the import of the holding in the *Lagow* case as cited by appellant. Under such circumstances as detailed here in the conduct of the schools and the method of holding the classes, the contention that the board of education exceeded its statutory powers is not tenable. Questions of policy are solely for the determination of the board, and when they have once been determined by it the courts will not inquire into their propriety. (*People ex rel. Fursman* v. *City of Chicago*, 278 Ill. 318.) Courts will not interfere with the judgment of the board unless by

an arbitrary and discriminatory action it abuses the power granted. *Segar* v. *Board of Education*, 317 Ill. 418.

It is admitted by appellant that a school board has a wide discretion in the exercise of its powers; (*Board of School Inspectors* v. *People ex rel. Grove*, 20 Ill. 526; *Wilson* v. *Board of Education*, 233 Ill. 464; *People ex rel. Fursman* v. *City of Chicago*, 278 Ill. 318, *Segar* v. *Board of Education*, 317 Ill. 418;) but it is contended the discretion which may be exercised is that within powers conferred by the statute; that the board of education cannot exercise any power except in the manner provided by statute. *Carter Oil Co.* v. *Liggett*, 371 Ill. 482.

It is, of course, true the board of education cannot exercise any power except in the manner provided in the statute, but that always presents the difficult question as to whether or not, under the existing facts, it has improperly exercised a power not in any manner provided by such statute. Apparently, the board here had worked out a plan for religious education classes and by the plan it was not necessary for the schoolroom to be occupied for any other purpose at that particular time. Further, these classes were so arranged as not to conflict with others. This arrangement, coupled with the rule that courts will not interfere with the judgment of the board unless it has abused the powers granted, would not seem to be a violation of the power which the board was permitted to exercise.

It is urged by appellant that as the power is vested in school boards by the Illinois statutes, (Ill. Rev. Stat. 1945, chap. 122, par. 6-43,) to grant the temporary use of schoolhouses when not occupied by schools, for religious meetings and Sunday schools, no authority is granted to choose sects or denominations, and, in the absence of such authority there would be an equal duty to all applicants; that the existence of a discretion, either by grant or implication, would invalidate the statute as violative of section 2 of article II and article III of the constitution of Illinois, and as violative of the fourteenth amendment to the constitution of the United States. It is true that if the power is clearly legislative in nature and exclusively belongs to the legislative department of the government, its delegation by the legislature would be unconstitutional; but in sus-

taining grants of power the courts have been guided considerably by considerations of expediency. They have recognized that a certain degree of deliberation is essential to the efficient and effective operation of the government, and that in some situations the legislature must leave to the executive officers and administrative boards the duty of carrying out the mandate of the statute. As heretofore pointed out, school boards have a wide discretion in the exercise of powers conferred upon them, and the courts will not interfere with the judgment of the board unless by an arbitrary and discretionary action the powers granted are abused. As to the particular point that no authority is granted to choose sects, there was no choice here on the part of the board.

Aside from the fact that the question of discretion amounting to delegation of legislative power was not raised in any manner in the trial court, it does not appear from this record, including the testimony as referred to in appellant's brief, that there was any arbitrary and discretionary action by the board of the particular powers granted. Appellant's contention in this respect cannot be maintained.

We have the record here, which, relieved of its excess verbiage, technicalities and niceties, presents the simple question, does either the Federal or State constitution, or both, in their guaranty of religious freedom, prohibit voluntary religious classes in the public schools under the plan as disclosed by this record? Certainly, such classes do not violate the freedom of conscience of any individual or group so long as the classes are conducted upon a purely voluntary basis. Freedom of religion as intended by those who wrote the State and Federal constitutions means the right of an individual to entertain any desired religious belief without interference from the State. Our government very wisely refuses to recognize a specific religion, but this cannot mean that the government does not recognize or subscribe to religious ideals. We find such recognition in the very preamble of our State constitution. The government does not recognize a particular faith but this does not mean that it is indifferent to religious faith. To deny the existence of religious motivation is to deny the inspiration and authority of the constitution itself.

We do not find, from this voluminous record, anything that would warrant us in finding that there has been any violation of State and Federal guaranties, or, under the system as outlined, a violation of section 6-43 of the School Code of Illinois.

For the reasons heretofore announced, the judgment of the circuit court is affirmed.

Judgment affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 1374 90

PEOPLE OF THE STATE OF ILLINOIS EX REL VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, AND ELMER C. BASH AND ALICE J. BASH, AND WANDA I. BASH, A MINOR, BY ELMER C. BASH, HER FATHER AND NEXT FRIEND,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OPPOSING MOTION TO DISMISS APPEAL.

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THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 1374

PEOPLE OF THE STATE OF ILLINOIS EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, AND ELMER C. BASH AND ALICE J. BASH, AND WANDA I. BASH, A MINOR, BY ELMER C. BASH, HER FATHER AND NEXT FRIEND,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OPPOSING MOTION TO DISMISS APPEAL.

MAY IT PLEASE THE COURT:

The Motion to Dismiss Appeal.

Appellant's Jurisdictional Statement presents in detail her position that the present case involves a state statutory provision within the terms established by this Court in *Hamilton* v. *University of California,* 293 U. S. 245 (1934). The record in this case also shows that Appellant presented

federal constitutional issues to the State Supreme Court and that the State Supreme Court ruled on their validity under the Constitution of the United States. In *Wilson* v. *Cook*, 327 U. S. 474 (1946), this Court says that one of these showings is necessary.

Appellees claim that no issue was properly raised because appellant's complaint asked for affirmative action prohibiting religious teaching by sectarian groups in the public schools during school hours and in the regular school class rooms made available by temporary abandonment of public school work. Appellees claim that this is an attack on inaction, involving not legislation but a failure to legislate. This statement is difficult to understand. The conduct complained of in this case is not one of inaction, but one of affirmative action in authorizing sectarian groups to appear and teach as a part of the public school system. The purpose of this suit is to defeat such action. Had there been no affirmative action permitting sectarian teaching as a part of the public school curriculum, there would have been no case in the State courts and no appeal to this Court.

This case involves affirmative action, legislative in character, and presents a problem with respect to all public schools in Illinois. In this respect it is much more important than *Hamilton* v. *University of California*, 293 U. S. 245, which involved but one state institution.

The fact that the action is one of a local governmental body does not defeat jurisdiction. *King Manufacturing Company* v. *Augusta*, 277 U. S. 100 (1928). In the present case jurisdiction is stronger than in the *Augusta* case, for the action supported by the Supreme Court of Illinois establishes a policy applicable to all school bodies within the state.

Federal Constitutional Issues Are Involved.

Appellees contend that both appeal and petition for certiorari should be denied on the ground that federal constitutional issues were not substantially presented, and that such issues were properly decided by the Supreme Court of Illinois. Appellees further allege that Appellant did not rely on the First Amendment in presenting the case to the Supreme Court of Illinois, which obviously she did not.

As indicated in Appellant's Jurisdictional Statement, her complaint was a tax-payer's action, and alleged violation of the Fourteenth Amendment both in expenditures for religious purposes and in other respects (R. 5, 10, 12, 17, 18). That the present action is a taxpayer's action is expressly recognized by the Supreme Court of Illinois. The briefs before the Supreme Court of Illinois are not before this Court, but Appellees are correct in their intimation that Appellant's brief separately discussed the provisions of the Illinois constitution which forbid preference to any religious denomination or mode of worship, and also forbid any contribution or pay from any public fund in aid of any church or sectarian purpose (Illinois Constitution, Article II, Section 3; Article VIII, Section 3). Appellant's brief also separately argued the application of an Illinois statutory provision as to other uses of public school buildings "when not occupied by schools" (Illinois Revised Statutes, 1945, Chapter 122, Section 6-43). The final construction of these state constitutional provisions and of this state statute rested with the Supreme Court of Illinois and is not presented to this Court.

Appellant, however, is in error in saying that "the attack on the use of public property was based solely upon Section 3 of Article VIII of the Illinois Constitution." Weight was largely placed upon the State statute.

Other issues discussed by Appellant's brief in the Supreme Court of Illinois related to freedom of religion;

segregation of religious groups in public schools; and religious censorship of groups permitted or refused permission to participate in sectarian instruction in the public schools. Each of these issues was argued on the basis of the 14th Amendment and of similar provisions of the State Constitution. Appellees now assert that Appellant cannot claim that there was improper use of public property and public funds in the application of such a policy. In broadly charging interference with freedom of religion through sectarian use of public schools, Appellant's brief in the Supreme Court of Illinois made no specific statement that public schools are financed by taxation, but left to judicial notice the fact that the activities alleged to violate the Fourteenth Amendment necessarily involve the expenditure of public funds. The contention of Appellant is that sectarian education is made a part of the public school system. The charging of one individual or one religious group with the religious expenses of another is no more a denial of freedom of religion than is the discrimination between sectarian groups in public schools, and each will involve public funds. Public expenditure as a part of the plan here at issue is fully covered by Appellant's complaint, and is an essential element in the plan of making sectarian education a part of the public school system through the use of public schools during regular school hours. And from the standpoint of freedom of religion there is certainly a difference of financial interest between those permitted and those not permitted to give religious instruction in the schools.

Appellees claim that the religious instruction here at issue is voluntary, upon request of the parents, and equally open to all religions and to all religious teachings. Such instruction primarily relates to the 4th, 5th and 6th grades (R. 117, 287, 330-331). The attendance of public schools by children is not voluntary upon their part or that of their parents, and the intended purpose of the plan here at issue

is for religious groups to reach children who are assembled by the public schools.

In this case the school authorities distributed and then collected a "Parent's Request Card" which requested that the parents "please permit" the pupil "to attend a class in Religious Education," with an opportunity to choose "Interdenominational, Protestant, Roman Catholic, Jewish" (R. 227). At no time was there interdenominational instruction except the Protestant; and for two years before this litigation no Jewish instruction had taken place (R. 287, 294).

All students in a grade class were classified by the school authorities. Protestant and Catholic were assigned class rooms for use during what were otherwise public school class hours. The Protestant group being dominant in number, the regular class room was usually employed for religious teaching, with the public school teacher remaining in the room during the religious instruction (R. 119, 172, 177). In such a case the Catholics were assigned another room (R. 194). Those who did not take religious education remained in their room if those taking religious education went elsewhere (R. 190, 319); otherwise, they went elsewhere (R. 318). The boy here most directly involved was once sent to sit alone in the corridor (R. 171-173).

Those who belonged to the religious groups, together with those who did not, were definitely segregated in their public school building and during their public school hours. Whether there is a program of religious education voluntary to all parties and in accord with religious freedom is for this Court to determine. The segregation of students of necessity emphasizes religious differences, beginning with the 4th grade of the public schools. Appellant quotes here her statement to the Supreme Court of Illinois:

> "Friction in religion has been a characteristic of children which is not uncommon among adults—a char-

> acteristic which has in the past brought some conflict among children of different religious groups, even in the absence of separate public school classifications which would obviously differentiate religious groups, and lay the basis for religious controversy."

Appellees' statement opposing jurisdiction makes an interesting contrast between a public school cafeteria and the issue here involved. If a public school cafeteria were so operated as to completely segregate into separate rooms and to prejudice those of different religious groups, something of contrast might be sustained.

The alleged freedom to teach all religions does not exist in this case. As indicated in Appellant's Jurisdictional Statement, the Supreme Court of Illinois stated that "the question of discretion amounting to delegation of legislative power was not raised in any manner in the trial court." The discretion to permit or forbid teaching by a particular religious group was presented to the trial court, which, in its opinion, said:

> "Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public school buildings said faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system." (R. 83.)

Not only this, but the Supreme Court of Illinois said in its opinion that: "Questions of policy are solely for the determination of the board * * *." And in their Statement opposing Jurisdiction, Appellees, while stating that additional groups, even atheists, are permitted to participate in religious instruction, state that:

> "Lesson materials and curriculum are selected by a committee to avoid any offensive, doctrinal, dogmatic or sectarian teaching."

The record in this case clearly presents the issue of *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), in which this Court held that censorship of religion is violative of the Fourteenth Amendment.

This Case Involves an Important Federal Question Not Heretofore Determined by This Court.

This case involves the bringing of religious teaching into public schools by sectarian groups, through the use of public school buildings and hours, and through the use of public school teachers or officers for the gathering of the groups of pupils—a joinder of sectarian teaching with that of the public schools, subject to supervision and administration as a part of the public school system.

The Court of Appeals of New York and the Supreme Court of Illinois have sustained a plan under which public school students may be excused at the request of their parents for one hour each week before the end of the regular school period for the purpose of attending religious educational classes outside of the school activities or property. *People ex rel Lewis* v. *Graves*, 245 N. Y. 195 (1927); *People ex rel Latimer* v. *Board of Education of the City of Chicago*, 394 Ill. 228 (1946). Neither of these cases involved the bringing of sectarian instruction into public schools by sectarian instructors. Each gives the student an additional hour within which to join his sectarian instructors upon their own premises. The issue in these cases was essentially different from that here presented.

This Court has recently sustained a use of public funds to pay expenses of transportation not only to public schools but also to parochial schools to which students were permitted to go instead of attending public schools. *Everson* v. *Board of Education of Ewing Twp.*, ... U. S. .....; 67 S. Ct. 504 (February 10, 1947). The *Everson* case in no way

involves the issue of bringing sectarian instruction into the public schools.

The *Everson* case and that of *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930) are based upon the fact that the use of parochial schools is permitted in substitution for compulsory public education. Under these circumstances, the public bore an incidental expense but avoided a much heavier one, without sponsoring sectarian teaching. The case now before the Court brings sectarian education into the public schools, as a part of their curricula.

The present case involves issues which must be settled if the freedom of religion is to be maintained.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 90

PEOPLE OF THE STATE OF ILLINOIS EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, AND ELMER C. BASH AND ALICE J. BASH, AND WANDA I. BASH, A MINOR, BY ELMER C. BASH, HER FATHER AND NEXT FRIEND,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLANT.

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLANT.

THE OPINIONS BELOW.

The opinion of the Supreme Court of Illinois is officially reported in 396 Illinois, 14 (1947). It appears also in 71 N.E. 2d 161. The opinion of the trial court is not officially reported, but is set forth in full in pages 60 to 89 of the transcript of record in this case.

JURISDICTION.

This matter is fully discussed in the Statement as to Jurisdiction; the Statement opposing Jurisdiction, with motion to dismiss; and the Brief opposing motion to dismiss appeal. In granting jurisdiction, this Court has assumed that there is sufficient basis for appeal on the ground that a state statutory provision is involved, although the action involved is that of a local board of education.

With respect to validity under the Constitution of the United States, the issues have "been presented for decision to the highest court of the state;" have "in fact been decided by that court;" and "its decision was necessary to the judgment." *Wilson* v. *Cook*, 327 U. S. 474.

Appellees have contended that this Court has no jurisdiction as to two issues: (1) use of public property and of public services in the religious instruction and (2) the issue as to whether appellee school board has a discretion to determine what bodies should engage in religious instruction, and what should be the manner of such instruction.

The appellant presented the issues to the Supreme Court of Illinois on the broad basis that:

> "A sectarian basis in violation of the 14th Amendment and of Article II, Section 3 and Article VIII, Section 3, of the Constitution of Illinois, is established by the development of sectarian groups in the public schools, and such a development violates freedom of religion."

That Court said that the suit was brought by a "resident and taxpayer," and stated the issue to be whether "either the Federal or State Constitution, or both, in their

guarantee of religious freedom" prohibit the plan disclosed by the record.

Although such a plan cannot be operated without the use of public property and of public services, which are essential elements of the plan, Appellees have contended that this federal constitutional issue was not presented to the Supreme Court of Illinois, before which the argument primarily applied to a specific provision of the constitution of Illinois, which forbids public aid or support of any church or sectarian purpose. In stating the general issue, as quoted above from Appellant's brief in the State Supreme Court, both the 14th Amendment and the Illinois Constitutional provisions are cited.

As indicated in Appellant's Jurisdictional Statement, her complaint was a taxpayer's action, and alleged violation of the Fourteenth Amendment both in expenditures for religious purposes and in other respects (Transcript 8, 10, 14). That the present action is a taxpayer's action is expressly recognized by the Supreme Court of Illinois. The briefs before the Supreme Court of Illinois are not before this Court, but Appellees are correct in their intimation that Appellant's brief separately discussed the provisions of the Illinois constitution which forbid preference to any religious denomination or mode of worship, and also forbid any contribution or pay from any public fund in aid of any church or sectarian purpose (Illinois Constitution, Article II, Section 3; Article VIII, Section 3). Appellant's brief also separately argued the application of an Illinois statutory provision as to other uses of public school buildings "when not occupied by schools" (Illinois Revised Statutes, 1945, Chapter 122, Section 6-43). The final construction of these state constitutional provisions and of this state statute rested with the Supreme Court of Illinois and is not presented to this Court.

Other issues discussed by Appellant's brief in the Su-

preme Court of Illinois related to freedom of religion; segregation of religious groups in public schools; and religious censorship of groups permitted or refused permission to participate in sectarian instruction in the public schools. Each of these issues was argued on the basis of the 14th Amendment and of similar provisions of the State Constitution. Appellees now assert that Appellant cannot claim that there was improper use of public property and public funds in the application of such a policy. In broadly charging interference with freedom of religion through sectarian use of public schools, Appellant's brief in the Supreme Court of Illinois made no specific statement that public schools are financed by taxation, but left to judicial notice the fact that the activities alleged to violate the Fourteenth Amendment necessarily involve the expenditure of public funds. The contention of Appellant is that sectarian education is made a part of the public school system. Public expenditure as a part of the plan here at issue is fully covered by Appellant's complaint, and is an essential element in the plan of making sectarian education a part of the public school system through the use of public schools during regular school hours.

As to a discretion of the school board to determine who should teach and how they shall teach religion, the Supreme Court of Illinois stated that "the question of discretion amounting to delegation of legislative power was not raised in any manner in the trial court." The substantial amount of evidence received by the trial court upon this matter, together with the opinion of that court upon the issue, are found at pages 9-11 of this brief. Not only this, but the Supreme Court of Illinois said in its opinion that: "Questions of policy are solely for the determination of the board . . . ." And in their Statement opposing Jurisdiction, Appellees, while stating that additional groups, even atheists, are permitted to participate in religious instruction, state that:

"Lesson materials and curriculum are selected by a committee to avoid any offensive, doctrinal, dogmatic or sectarian teaching."

The record in this case presents the same issue as *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), in which this Court held that censorship of religion is violative of the Fourteenth Amendment.

STATEMENT OF THE CASE.

This case involves religious teaching in the public schools of the City of Champaign, Illinois, during regular school hours, and in the public school buildings and class rooms. Attendance upon the public schools is compulsory, between the ages of seven to sixteen, except for attendance at private or parochial schools, and certain other limited exceptions (Illinois Revised Statutes, ch. 122, sec. 26-1). The religious teachers are selected and paid by a local non-official council of religious education. School children taking such religious education are during school hours released from secular work, and regular school rooms are provided for the religious classes. The above facts are set out by the trial court (Transcript, 61), which, in its opinion of January 12, 1946, also said that

> "religious education classes were established and maintained in the public school buildings in the City of Champaign, Illinois, for about five years last past under arrangements made between the defendant school board and a group known as 'The Champaign Council of Religious Education,' a voluntary association made up of the representatives of the Jewish, Roman Catholic and Protestant faiths in the school district" (Transcript, 61. See also Transcript, 128, 156).

Permission for such religious teaching was granted by the board of education on June 6, 1940 (Transcript, 127).

Religious teachers, who are not teachers in the public school system, teach religious classes, since 1941, of thirty minutes each week in the 4th, 5th and 6th grades of elementary schools, and fifty minutes each week in the 7th, 8th and 9th grades of the junior high school (Transcript, 91, 137), subject to the approval and supervision of the super-

intendent of schools (Transcript, 123, 127-128). There were about 35 religious education classes in the public schools in 1945 (Transcript, 91).

Cards are distributed to parents of elementary students (fourth, fifth and sixth grades) by the public school teachers (Transcript, 176) requesting that they "*please permit*" their children to attend a class in religious education. The cards, which are returned to the teacher of religion either by the public school teachers or by pupils (Transcript, 94, 133, 147, 253), indicate an opportunity to choose "Interdenominational, Protestant, Roman Catholic, Jewish" education, but there has been no interdenominational instruction except Protestant, and no Jewish instruction has taken place for three years before the beginning of this litigation (Transcript, 224, 229).

Printed schedules are distributed to junior high school students, to be filled, and the superintendent of schools testified that the words "religious education do not appear on the blank anywhere that I know of" (Transcript, 240), but Alice J. Bash, an intervenor and witness on her own and defendant's behalf, testified that her daughter wrote "Course in Religious Education" where the schedule says "Do you wish to take band, orchestra or religious education" (Transcript, 234. See also p. 252). Schedules given from the office of the school principal indicate the rooms for religious instruction of those in the junior high school (Transcript, 153).

The solicitation of elementary students is more specific than that of junior high school students, and the plan of religious education is employed primarily with the elementary groups. The President of the Council of Religious Education testified as follows:

> "In the junior high school in 1944 and 1945 there were 134 children registered in the religious education classes. There were several hundred students in junior

high school, in excess of 800. Last year in the 6th grade through the district there were 249 enrolled in the religious education classes. The total enrollment in the 6th grade is 295. In the 5th grade in the religious education class there were 206 out of a total enrollment of 286. In the 4th grade 196 out of a total enrollment of 298" (Transcript, 258).

The teacher of religion makes a report of absence of a pupil "just like any teacher would to the superintendent's office" (Transcript 224, 238).

Classes in religious education are held in the regular teaching rooms of public school buildings. The rooms are temporarily turned over to the religious teacher, and the religious classes are held during the regular school hours, the regular class being adjourned for that purpose (Transcript, 92, 137).

The public school teacher often remains in the room being used for religious education, this usually being her regular room. This is the case when all or nearly all of the children of her class take the religious teaching (Transcript, 92, 133, 137). That this would be more convenient to the public school teacher is obvious, and there is some evidence that acceptance of religious teaching was urged on this account (Transcript, 175, 178). During the period of religious instruction she is relieved from duty if all members of the class take such instruction.

In May, 1945, the board of education mimeographed 500 parent request cards (Transcript, 176, 223) on paper belonging to the school board (Transcript, 240), for the mimeographing of which it received $1.05 from Miss Chapin (Transcript, 240, 266), on behalf of the Council on Religious Education. The superintendent of schools testified that: "No moneys to my knowledge have been paid out or expended by the defendant in connection with or because of or for the benefit of the religious education classes"

(Transcript, 239). No testimony indicates probable cost to the religious organization, had it been required to furnish its own facilities; but an adequate showing of the use of public property and public service appears in the record (Transcript, 237-239). The activity of public school teachers and officers in connection with religious instruction is indicated above.

All students in the elementary classes were classified, and the several groups were segregated by the school authorities. Separate rooms were provided for Protestants, Catholics and Jews (Transcript, 105, 150, 229), although there has been no Jewish instruction for several years (Transcript, 224, 229). The Protestant group being dominant in number, the regular class rooms were usually employed for their religious teaching during what were otherwise public school class hours, with the public school teacher remaining in the room during the religious instruction (Transcript, 92, 133, 137). The Catholics were assigned other rooms (Transcript, 150). Those in the elementary grades who did not take religious education remained in their class rooms if those taking religious education went elsewhere (Transcript, 147, 249); otherwise they went elsewhere (Transcript, 248). The son of the appellant in this case was once sent to sit alone in the corridor (Transcript, 132).

Delos L. Huxtable, president of the school board, testified that all religious groups were to be treated alike, and that the teachers they brought into the school were to be approved by the superintendent, to whom was delegated supervision of this activity (Transcript, 127, 128).

Eugene Harvey Mellon, superintendent of schools, testified that he does not determine who are the teachers of religious education, and that they are determined by the representatives of the "Champaign Council of Religious

Education," but that the board has an unwritten reservation that the person should be qualified to teach and use good grammar and language. He said further that he did not consider what religious denominations desired to teach, and that Jehovah's Witnesses might use a room "if the person were qualified to teach properly." He added that: "As far as I know classrooms are available to a person who believes in no religion," and that: "The school buildings are now available to all religious denominations in this community to be used while they are being used by students" (Transcript, 117-119).

Upon being recalled, Mr. Mellon stated that "all the groups should work together; it would be hard for us as a board of education or as a superintendent to work with a lot of different groups" (Transcript, 127). He stated to a representative of Jehovah's Witnesses that orderly procedure was necessary (Transcript, 127); and the representative of that group testified that: "They said it would be possible, but we would have to go through the regular procedure" (Transcript, 123). When called as a witness for defendant, Mr. Mellon said that he told plaintiff "That would go a little further" when asked if he would permit the teaching of children not to salute the flag (Transcript, 239), although he earlier said that this could be done (Transcript, 118).

Rev. Herbert L. Miller, a minister of the Episcopal Church, President of the Champaign Council of Religious Education, testified that it was the policy of the Protestant curriculum committee "to prevent any material being used that would bring up controversies or difficulties" (Transcript, 227). Rev. Alva R. Cartlidge, pastor of the First Presbyterian Church of Champaign and chairman of the personnel committee selecting and approving teachers in the Protestant group, testified that: "We intend to pro-

tect the courses against antagonistic matter being taught. As far as we are able, we examine the material to be sure none is antagonistic to other religious organizations" (Transcript, 162). But a document prejudicial to other than Christians may once have been used (Transcript, 95).

The trial court found that: "The defendant school district has been willing to grant its permission for the similar free and equal use of rooms in the school buildings when not in use for school purposes, to any other faith or group which desires to make use of the schoolrooms belonging to the defendant, for instruction in the tenets or belief or unbelief of such other faith or groups" (Transcript, 65). But it adds that this may be subject to a provision that "their teachers had proper educational qualifications so that bad grammar for instance, would not be taught to the pupils," and, further, that the group must make application to the superintendent of schools "who in turn will determine whether or not it is practical for said group to teach in said school system" (Transcript, 65).

Testimony as to the matters indicated above is primarily by the president of the School Board (Transcript, 127); the superintendent of schools (Transcript, 117, 237, 267); the public school teachers, including those involved in the transactions with respect to Appellant's son (Transcript, 110, 132, 146, 254); and the religious education teachers (Transcript, 90, 137, 150, 222, 228).

Many other matters appear in the pleadings and evidence which are only incidentally relevant or material to the issues of the case. The religious, or they may be termed non-religious, views of appellant are developed both in pleading and in evidence (Transcript, 2, 46, 168, 208), and are contrasted with Unitarianism (Transcript, 217-222). The character and efficiency of the religious teaching are matters of testimony by the Protestant teachers (Tran-

script, 90, 137, 222), as are the Catholic (Transcript, 150), and Jewish (Transcript, 228); and this testimony is supplemented by ministers who have an active part in the plan of religious teaching (Transcript, 120, 128, 155, 225, 258). Thirteen students were called by the Appellee Board of Education, to testify that they were not coerced to take religious instruction, nor embarrassed by failure to do so, or by failure to continue, if they were once in a class for religious instruction (Transcript, 243-254, 259-267). The son of appellant, when the only person in his class not taking religious instruction (Transcript, 132), was embarrassed when placed alone in the hall or in the music room (Transcript, 177-178, 255).

As stated by the Supreme Court of Illinois, the appellant, Vashti McCollum, a resident and taxpayer in Champaign School District No. 71, sought by writ of mandamus "to prohibit the teaching of religious education in the public schools during the hours when the public schools are regularly in session. The defendant school district includes all of the schools and school buildings in the city of Champaign." By agreement of the parties three judges sat *en banc* in the trial of the case (Transcript, 61), and denied the writ of mandamus (Transcript, 89). This judgment was affirmed by the Supreme Court of Illinois (Transcript, 280).

ERRORS RELIED UPON.

1. The Supreme Court of Illinois erred in sustaining a plan of religious education in public schools which deprives of due process of law and denies equal protection of the laws, through a law "respecting an establishment of religion and prohibiting the free exercise thereof," in violation of the Fourteenth Amendment; such plan in its opinion applying to participating and non-participating sectarian groups and also to those who accept no creed, with the public expense borne equally by taxpayers of all such groups. The Supreme Court of Illinois denies a freedom of religion which is common to all and as to which all must be treated equally.

2. The Supreme Court of Illinois erred in sustaining a plan segregating public-school pupils into sectarian groups for religious education, with a separate segregation of those refusing to join in such education, such plan being violative of the Fourteenth Amendment to the Constitution of the United States. Such plan violates the constitutional guarantee of freedom of religion: encourages the creation and friction of sectarian groups in the public schools; forces the segregation of non-religious groups; and places a majority or dominant religious group in a controlling position in the public school system, which requires compulsory attendance except where there is attendance at a private or parochial school having designated standards.

3. The Supreme Court of Illinois erred in sustaining a discretion vested in an administrative body and officer to determine (1) what sectarian groups should be permitted to teach public school pupils in the public school

buildings and during school hours; (2) the character of religious teachers of such groups; and (3) the material to be taught; such discretionary powers in religious education in the public schools being in violation of the guarantees of due process of law and of equal protection of the laws of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT.

The assignment of errors summarizes the argument in this case. To such assignment may be added the statement of the Supreme Court of Illinois that appellant, a resident and taxpayer, "seeks to prohibit the teaching of religious education in the public schools during the hours when the public schools are regularly in session." In this respect it is argued that the state makes a law respecting an establishment of religion, in violation of the Fourteenth Amendment, by the development of sectarian groups in the public schools, and that such a development violates freedom of religion. If such a plan were valid, the power exercised by school authorities to determine who shall teach and what may be taught is invalid.

ARGUMENT.

I.

Public Schools and Sectarian Instruction.

Sectarian instruction and sectarian services are closely associated with public schools. The public school buildings are often subjected to religious use. By statute the state of Illinois permits the use of school buildings for religious meetings and Sunday schools, and for other educational and social interests "*when not occupied by schools*" (Illinois Revised Statutes, ch. 122, sec. 6-43; *Nichols* v. *School Directors*, 93 Ill. 61). This may be termed a part of the program of using school buildings as civic centers; and the opinions upon such use are discussed in 161 A. L. R. 398. Freedom of speech in the use of such buildings is considered in the recent case of *Danskin* v. *San Diego Unified School District*, 28 Cal. (2d) 536, 171 Pac. (2d) 885. Earlier cases upon religious meetings in school houses are found in 5 A. L. R. 886-890 and in 141 A. L. R. 1153. New York apparently does not now permit such use. University of the State of New York Bulletin, No. 1260. January 3, 1944, Law Pamphlet 6, Use of School Buildings.

The reading of one of the translations of the Bible, and other religious services, are common in the puolic schools of a number of states. Information upon this subject is found in the Bureau of Education Bulletin 1923, No. 15 on "The Bible in the Public Schools"; and a more complete discussion of cases will be found in 5 A. L. R. 866 and 141 A. L. R. 1144, and in 47 American Jurisprudence, Schools, Sections 208-215.

In several states, including Illinois, the Courts have held such proceedings invalid, even though students not desiring to attend the religious service were permitted to be excused from attending. *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334 (1910); *Knowlton* v. *Baumhover*, 182 Ia. 691, 166 N. W. 202, 5 A. L. R. 841 (1918); *Herold* v. *Parish Board*, 136 La. 1034, 68 So. 116 (1915); *Harfst* v. *Hoegen*, 349 Mo. 808, 163 S. W. 2d 609, 141 A. L. R. 1136 (1941); *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 44 N. W. 967 (1890). The *Ring* case involved a Protestant service and a Catholic objection, as did the Louisiana and Wisconsin cases, although the Louisiana case involved both Catholics and Jews. Catholic services were involved in the Iowa and Missouri cases. Voluntary attendance upon daily religious exercises was sustained in Indiana when all of the children were of Catholic parents; and the religious services not within the school building nor within school hours. *State ex rel. Johnson* v. *Boyd*, 217 Ind. 348, 28 N. E. 2d 256 (1940).

In a number of states, statutes or school practices are the basis of a plan of releasing public school students for a short period of school hours, each week, such period to be applied to religious education, independent of the public school and not upon school property, upon the written request of the parent. Such a plan was sustained, independently of statute, by the opinion of *People ex rel. Lewis* v. *Graves*, 219 App. Div. 233, affirmed 245 N. Y. 195 (1927). A statutory provision was adopted in New York in 1940 providing that: "Absence for religious observation and education shall be permitted under rules that the Commissioner shall establish" (Sec. 625, Subdivision 2 of Paragraph B). The Superintendent of Education of New York has issued a rule for such absence, on the parent's request, for religious observance

"outside the school buildings and grounds" (University of State of New York, Bulletin No. 1260, January 3, 1944). A similar plan, adopted by the Board of Education of the City of Chicago, was sustained by the Supreme Court of Illinois in *People ex rel. Latimer* v. *Board of Education of the City of Chicago*, 394 Ill. 228 (1946). Statutory authorization of such a plan is found not only in New York but also in Iowa, Kentucky, Maine, Minnesota, Oregon, South Dakota and West Virginia; Minnesota permitting an absence of three hours a week (Minnesota Statutes, sec. 132.05, subdivision 3); and the operation of such a plan is not limited to the states here mentioned. Something as to its use will be found in "Weekday Classes in Religious Education," Bulletin 1941, No. 3, Federal Security Agency, U. S. Office of Education.

Credit has normally been given by the public schools for school work done in parochial schools of recognized standards. The Supreme Court of the State of Washington has, however, held that a public school student cannot be given credit in the public school for Bible study outside of the school. *State ex rel. Dearle* v. *Frazier*, 102 Wash. 369 (1918). The State Department of Education of the State of New York has approved the grant by a local board of education of "one complete high school credit to pupils who successfully complete a satisfactory course of religious education given on released time by approved outside religious agencies."

The furnishing of books and of transportation to students in parochial schools at public expense have been sustained by this Court. *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930); *Everson* v. *Board of Education*, 330 U. S. 1 (1947). Relevant cases have been discussed in the *Everson* case, and will also be found discussed in 118 A. L. R. 806; 146 A. L. R. 625,

which annotates *Mitchell* v. *Consolidated School District*, 17 Wash. (2d) 61; 135 Pac. (2d) 79 (1943); and in the recent case of *Bowker* v. *Baker*, 73 Cal. App. 2d 653, 167 Pac. 2d 256 (1946). Attention may also be called to the statement in *Board of Education* v. *Wheat*, 174 Md. 314, 199 Atl. 628 (1938), quoted with approval in *Chance* v. *Mississippi State Text Book Rating and Purchasing Board*, 190 Miss. 453, 469, 200 So. 706 (1941), that:

> "School attendance is compulsory and attendance at private or parochial schools is compliance with the law."

The following statement on page 338 of the dissent in *Board of Education* v. *Wheat* is also important:

> "It is a fact that, to the extent of the education afforded by private schools, including those of the denominational or sectarian class, the pupils in the public schools are lessened, and thereby the general taxpayers of the State are greatly benefited by the corresponding reduction in the cost of public school education, although the burden upon a large class of these taxpayers is increased by the additional expenses of private education * * *"

The aid is to the pupil, and the parochial school is a financial aid to the local taxing body.

The relations between public schools and sectarian institutions heretofore indicated with respect to (1) release of time for the purpose of religious instruction and (2) the furnishing of books and transportation of students in parochial schools, involve no public expense or public service for sectarian groups; no segregation of religious or non-religious groups in the public schools; and no right or opportunity to engage in control of who may teach and what may be taught by sectarian or non-religious groups.

The issue now for the first time presented to this Court involves (1) a public service to sectarian public school instruction through both personal help and school facilities, (2) an instruction in the school building and during school hours which will segregate the various religious and non-religious groups in the public school, and (3) a control by the school authorities of what religious views may be taught and how they may be taught.

The purpose of the plan here at issue is obvious. Present statistics are not available from the Bureau of the Census, but from 1926 to 1936 there was a substantial decrease in Sunday School attendance both in the United States as a whole and in the State of Illinois (Bureau of the Census: Religious Bodies; 1936, pp. 166-7, 168-9). No question is here raised as to whether the churches have performed their duties. The plan of dismissing public school students for an hour or more each week for religious instruction has not brought sufficient result. Children who are not going to parochial or private schools must attend the public schools, and whether the pressure indicated at pages 25-26 of this brief is or is not to be construed as leading to a voluntary result, it may be expected to have an influence upon the younger students who must be available in the public school. A solicitation is made possible to all who attend the public school in its lower grades and substantially all must attend.

In *Everson* v. *Board of Education*, 330 U. S. 1 (1946), this Court states at pages 15-16 the principle applicable to this case:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from

church against his will or force him to profess a belief or disbelief in any religions. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' *Reynolds* v. *United States, supra* (98 U. S. at 164, 25 L. ed. 249).'"

By operation of the 14th Amendment this statement applies to the states as well as the United States, and unless this principle is applied, a constitutional clause acting as "a wall of separation between Church and State," will become a wall uniting Church and State.

II.

Public Aid to Sectarian Groups.

This Court has said that:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations and groups and vice versa." (*Everson* v. *Board of Education*, 330 U. S. p. 16)

This statement carries with it an expenditure of public money raised by taxes as well as the levy of a tax.

It also relates to "religious organizations" such as the

Champaign Council of Religious Education, and to any similar but competing organizations which may establish themselves in the same territory.

The degree of school room occupation and the service of employees and teachers are sufficiently set forth on pages 6-9 of this brief.

The public school teachers distribute the cards to elementary students with respect to religious education and such cards were usually returned to the teachers for delivery to the religious teachers (Transcript, 94, 133, 148, 176, 253). Printed schedules are delivered to junior high school students by the school authorities and apparently bear a printed indication of right to register for religious instruction (Transcript, 153, 234, 240). The school authorities determine the rooms to be used by each sectarian group (Transcript, 150, 241), the room for secular teaching often being used, and the public school teacher often remaining throughout the period of religious instruction, turning over her class for such instruction and then re-assuming control on the expiration of the period for religious teaching (Transcript, 92, 133, 137, 241). The schedules for junior high school students are printed at the expense of the board of education (Transcript, 240). In May, 1945, the board of education mimeographed 500 parent request cards (Transcript, 176, 223, 240), to be used with the grades for which it received $1.05 from Miss Chapin (Transcript, 240, 266), teacher of religious education, on behalf of the Champaign Council on Religious Education. This payment is the only one at any time made.

The trial court stated "that no direct appropriation of any kind, or a direct expenditure of money of any kind, is made by the defendant school district for or on behalf of said religious education classes" (Transcript, 69, 240); and it added that "to some slight extent the defendant has in-

directly appropriated public funds for the use of these classes, by the furnishing of rooms in public school buildings, light, heat, janitor service, and so forth * * *" (Transcript, 70).

It is obvious that the services rendered by the school employees and teachers and the occupancy of rooms would have cost a substantial amount had the religious groups been requested to pay for them as a private enterprise. The Supreme Court of Illinois says that the principle of *de minimis non curat lex* should apply in this case, but the record shows a substantial service of rooms and individual help. Moreover, this Court says that the same principle applies whether the amount be "large or small." If the amount were computed as the ordinary expense for personal services and use of rooms it would not be unduly small.

The constitutional provisions of the State of Illinois are not here involved, but Article VIII, section 3, of that constitution forbids any governing body to "make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose," and further forbids any help to support or sustain, or any grant or donation of any real or personal property for any sectarian purpose.

The New York Constitution, Article XI, section 4, contains a provision similar to that of Illinois, forbidding the use of public money in aid of any school, "under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught." In *People ex rel Lewis* v. *Graves*, 219 App. Div. 233; 219 N. Y. S. 189 (1927), the court said, 219 App. Div. page 236:

> "Here there was no property or public money used in aid or maintenance of any denominational school. Cards not provided by the school were distributed and the parents indicated thereon the place they wished

their children to go for instruction. It was entirely voluntary with the parent whether the child was excused. There was some 'check-up' afterward to indicate whether the privilege should be withdrawn. All that the petitioner can claim in regard to public expense is the time spent by the teacher during school hours in thus issuing or receiving the card, excusing the child, and ascertaining if possible, if the parent's direction had been obeyed. The acts of the teacher are the same as when excusing a child to attend any religious or secular ceremony at its parent's request. It is a part of ordinary school routine and discipline. The Constitution is designed for practical purposes and deals with realities, not fictions or conditions largely imaginary * * *. Its commands are not violated by acts so trivial and remote."

In 245 N. Y. 195 (1927) the Court of Appeals sustained this decision, with the statement that:

"The city of White Plains does not use public money to aid the church schools, although the cooperation between the public schools and the church schools requires a slight use of the time of the school teachers in registering and checking up excuses * * *. The separation of the public school system from religious denominational instruction is thus complete."

In *Stein* v. *Brown*, 211 N. Y. Supp. 822, 125 Misc. 692 (1925), a supreme court of the State of New York, with respect to the mere printing of cards for a committee on week-day religious education (parallel with the mimeographing in the present case), said:

"The cards hereinbefore mentioned were printed during school hours upon the presses and upon the property and premises of the Board of Education or the city. The action of the defendants was to that extent unlawful and in violation of Article IX, section 4 of the State Constitution * * *."

In the New York Supreme Court and in the Appellate Division the *Stein* case was said to be limited to its facts (215 N. Y. Supp. 632; 219 N. Y. Supp. 189, 193), but the opinion has not been overruled. The constitutional provision has since been amended but only to grant power to transport children to and from private schools, a change brought about in 1938 by *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d, 576 (1938); 118 A. L. R. 789.

The facts of this case do not require dependence upon the *Stein* case. In the present case the use of public money directly for sectarian instruction is several times as great as is the use of money involved in *People ex rel Lewis* v. *Graves*, for other than directly sectarian instruction by public schools. In the present case the service to sectarian groups is not "a part of ordinary school routine and discipline," as in the *Graves* case.

The fact that no direct appropriation has been made and that expenditures have been made in such a manner as not to be reduced to dollars and cents is not controlling. If it were, the constitutional restrictions could be easily avoided. Both state and federal constitutions forbid sectarian use of any public fund or of any grant or donation of public land, money or other personal property for any sectarian purpose. The statement in *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 340, is clearly applicable:

> "The public schools are supported by taxation, and if sectarian instruction should be permitted in them, the money used in their support would be used in aid of a sectarian purpose. The prohibition of such use of public funds is therefore a prohibition of the giving of sectarian instruction in the public schools."

This Court is expected to consider the normal value of services rendered by the School District. Such value cannot be specifically determined, but the proportional service

to the sectarian groups and its proportional cost may well be considered.

The plan here at issue is parallel with that defeated by Thomas Jefferson and James Madison, and disapproved by this Court, except that the Virginia plan proposed in 1784 provided a more orderly distribution of government support. (*Everson* v. *Board of Education,* 330 U. S. pp. 11-12, 63-74). Moreover, the plan here at issue, if approved, places no limit upon the time and facilities furnished to sectarian groups by public schools, unless this Court should regard authority to impose such limitations as within its jurisdiction. If a half-hour of sectarian religious education is proper in public schools during school hours, with the assistance of public school teachers, longer periods must be sustained, if adopted.

As a matter of fact it is not the use of public school buildings and of public school teachers which violates the constitution; it is the maintenance of instruction by religious groups in the public schools through the use of the resources of such schools. If all sectarian and non-sectarian groups are to take over school rooms during school hours, the purposes of the public school will be defeated.

III.

Sectarian Grouping in the Public Schools.

The Supreme Court of Illinois says that the plan here at issue is one of "voluntary religious classes in the public schools • • • conducted upon a purely voluntary basis."

Attendance at the public school is not voluntary. A request through the public school that the parents "*please permit*" their children in the fourth, fifth and sixth grades to take one of four types of religious education, two of

which are now non-existent (Transcript, 176), is not on a purely voluntary basis. A voluntary segregation of religious groups may result from a favorable reply to the request by the public school that students join one of the groups; but there can be nothing voluntary in the segregation of those who do not join one of the groups. Such is the situation in this case, with a son the only member of a class who did not take religious education, and it was only natural that his teacher might ask him to release her by taking religious education (Transcript, 179).

As previously indicated, the plan in this school district is at present and has for sometime been that of religious instruction for Protestant and Catholic, with provision of public school rooms and of school time periods for such instruction, and with other provisions for those who do do not register. Each group would obviously know the membership of other groups, and each individual of a class would know when one or more members were not taking religious education (Transcript, 255, 257).

People ex rel. Ring v. *Board of Education*, 245 Ill. 334 (1910) involved a public school having a single religious exercise, subject to a right to be excused therefrom. With reference to the excusing of a pupil, the Supreme Court of Illinois said, at page 351:

> "The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated."

That this statement applies to the present case is indicated by the fact that his teacher advised the appellant to have her son join the religious education class (Transcript, 192).

The *Ring* case involved a Protestant service and a Cath-

olic objection. A similar situation recently presented itself with respect to a Catholic service and the possibility of a non-Catholic being excused, in *Harfst* v. *Hoegen*, 349 Mo. 808; 163 S.W. 2d, 609; 141 A.L.R. 1136 (1941). With respect to a Catholic service from which others could be excused, the Iowa Supreme Court in *Knowlton* v. *Baumhover*, 182 Ia. 691, 166 N.W. 202, 5 A.L.R. 841 (1918) quoted with approval a statement of the Louisiana Court, substantially identical with that of the Supreme Court of Illinois, in a case of Protestant religious service objected to by Jews and by a Catholic. *Herold* v. *Parish Board*, 136 La. 1034; 68 So. 116, L.R.A. 1915D, 941; Anno. Cas. 1916 A. 806. A similar view is taken in *State ex rel. Weiss* v. *District Board*, 76 Wis. 177; 44 N.W. 967.

In the present case there are three religious groups and religious education classes, with one of the three abandoned for several years, with a possibility of an increased number of such classes, and with a right not to register students for any one of the religious classes.

With respect to the students who are registered, there will in practically all areas of the state be one religious group which has a substantial majority, either Protestant or Catholic; and in substantially all areas the Jews will be in a small minority. And if Jehovah's Witnesses are given an opportunity to teach in the public schools, an opportunity to which they are entitled should the present plan be sustained, they have a constitutional right, even though a small minority, to make a general attack on all organized religious systems and to distribute literature of a provocative, abusive and ill-mannered character. *Cantwell* v. *Connecticut*, 310 U. S. 296, (1940), page 309; *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, pp. 115-116; 63 S. Ct. 870; 146 A.L.R. 81. All other religious organizations have equal rights in the public school, if there is a right of sectarian groups to teach in such schools.

Those who register for religious teaching in public schools by small sectarian groups may not have the feelings of an individual student which are described in the *Ring* case, but their segregation in religious teaching in the public schools will be advertised to other students by the school. By way of illustration, if there were an anti-Semitic attitude leading to an attack upon Jewish students by others, as has been the case in Chicago, the public school would furnish information as to those to be attacked. *Race Relations in Chicago,* page 5 (Report of the Mayor's Committee on Race Relations, December, 1944). The same result may develop as to any minority group, with respect to which religious friction may exist. This problem may not be material in School District No. 71 of Champaign County, but this Court is asked to establish a principle of general application.

It may, however, be urged that any public difficulties may be avoided by exercising a right not to register for religious teaching. This case involves the exercise of such right by appellant, Vashti McCollum, with respect to her son, James Terry McCollum (Transcript, 192), on the basis of belonging to neither Christian nor Jewish religious groups. Both testified to an embarrassment occasioned by such action (Transcript, 175, 193), and his teacher as defendant's witness, testified to steps taken by her with respect to his situation (Transcript, 257). Testimony on the part of defendant by three of James Terry McCollum's classmates (Transcript, 243, 260, 266), and by one student not his classmate (Transcript, 250), that they did not hear him teased or know of his embarrassment, are of no weight as to the effect upon him, nor is a similar statement by his teacher (Transcript, 255); and there is admission that he was once placed in the hall (Transcript, 255), and that children left in the room for religious teaching were conscious of a student's leaving the room (Transcript, 257).

The defendant School District and intervenors produced thirteen students as witnesses to testify that no pressure was upon them to take religious courses, and that they were not embarrassed by failure to take, or to continue in such courses (Transcript, 245-254, 259-266). A majority of these witnesses were Junior High School students, and it was not common that the religious courses be taken by a majority of students in the grades of the junior high school (Transcript, 258). Moreover, ten of them testified to intimate contact with local Protestant churches which participated in the public school courses, but which would not have embarrassed their members or attendants whom they may have regarded as having adequate religious teaching (Transcript, 246, 247, 252, 253, 254, 260, 261, 262, 264, 265).

This testimony has no bearing upon minority religious groups, nor upon individuals whose views may not accord with organized religious groups. Moreover, the testimony of these students that they were not embarrassed by failure to take or to continue religious training is negative evidence so far as it may involve the embarrassment of James Terry McCollum, and such evidence has long been considered as of light weight as against positive evidence by the parties directly involved. *C. D. and V. R. R. Co.* v. *Coyer*, 79 Ill. 373, 377 (1875). Nor is it material that witnesses testified as to the beneficial advantage to themselves of the religious teaching in public schools, as in the case of the daughter of the intervenors (Transcript, 153). There is no denial of the advantage of religious teaching. The issue is one as to such teaching in public schools, where friction may result which our constitutions have sought to prevent. And attention may be called to the fact that the embarrassment of James Terry McCollum, testified to in this case, is of the character indicated in *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 351, as arising

under such circumstances; and attention may be further called to the fact that a similar position has been taken by the Supreme Courts of Iowa, Louisiana, Missouri and Wisconsin.

Friction in religion has been a characteristic of children which is not uncommon among adults—a characteristic which has in the past brought some conflict among children of different religious groups, even in the absence of separate public school classifications which would obviously differentiate religious groups, and lay the basis for religious controversy.

A further differentiation of religious groups may bring about the establishment in the same territory of several organizations similar to the Champaign Council of Religious Education, but competing with each other.

Although the trial court found that James Terry McCollum was not subjected to embarrassment because of his religious opinions (Transcript, 68), it recognized that there is "natural embarrassment to a child in being the only one in his room who did not take the religious education course and who went out of the room to study by himself because of that fact" (Transcript, 69). This is precisely the embarrassment indicated by the Supreme Court of Illinois in the *Ring* case, and by the highest courts of four other states.

It must also be understood that the segregation which is an essential part of the system here at issue sets up lines of distinction between the several religious groups and between religious and non-religious groups—it distinguishes minorities which may be subject to attack. And enmity toward the Jews as a minority group is likely to be developed or expanded by implications that they contributed to the death of Christ, as was indicated in an outline used by the chief religious teacher of the Protestant churches (Transcript, 95, 98). Such plans are explicitly

condemned in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 637, 638:

> "Free public education if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party or faction
> • • •
>
> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend upon the outcome of no elections."

IV.

Censorship of Religion by Administrative Action.

The Supreme Court of Illinois says "that the question of discretion amounting to delegation of legislative power was not raised in any manner in the trial court." Testimony before the trial court upon this matter is summarized at pages 9-11 of this brief. That court said:

> "Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public school buildings such faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system." (Transcript, 65)

The trial court recognized a power to determine what religious groups shall teach in the public schools, and the Supreme Court of Illinois says in its opinion that "Questions of policy are solely for the determination of the board,

and when they have once been determined by it the courts will not inquire into their propriety."

Appellees, in their Statement Opposing Jurisdiction with Motion to Dismiss, say that: "Additional groups, even atheists, are to be fully permitted to participate in the program on the same terms * * *. Lesson materials and curriculum are selected by a committee to avoid any offensive, doctrinal, dogmatic or sectarian teaching."

This statement admits a control over what is to be taught, but disagrees with the statement of the trial court as to a supervision over what sectarian groups shall be permitted to teach.

If sectarian groups may be permitted to teach in public schools during regular school hours, and as a part of the public school system, the question presents itself as to a censorship controlling either what groups may teach or what they may teach. That such a censorship may not be employed is clearly established in *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court saying at page 305:

> "It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by th e First Amendment and included in the liberty which is within the protection of the Fourteenth."

The school authorities do not have the constitutional au-

thority to permit religious teaching in school rooms and during school hours; but, if they did have such power, they could not discriminate. The standard is indicated in *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, pp. 115-116:

> "Considerable emphasis is placed on the kind of literature which petitioners were distributing—its provocative, abusive and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. See *Douglas* v. *City of Jeanette*, 319 U. S. 157, 63 S. Ct. 877, 87 L. ed. 1324, concurring opinion, decided this day. But those considerations are no justification for the license tax which the ordinance imposes. Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights."

An effort to control as to what religious groups may teach in public schools, and as to how they may teach, is a violation of religious freedom, and an effort to permit such teaching without control would add to the frictions which at the best make such instruction violative of religious liberty.

And attention may again be called to the fact that segregation of public school pupils into religious groups in public school buildings and during school hours is itself a deprivation of freedom of religion in violation of the Fourteenth Amendment; and that, if such plan were valid, it would become substantially unworkable upon the assertion of their constitutional rights by antagonistic and controversial groups.

Were the plan here at issue to be sustained, it would be proper and probable that competing groups similar to the Champaign Council of Religious Education establish themselves in the same territory and each seek dominance in the public school system.

The asserted power to segregate pupils into religious groups and to superintend their religious training in public school rooms and at public expense during regular school hours does not exist; but, if it did, the plan here at issue is unconstitutional in that the choice of religious groups and the supervision of their teaching is under control of the public school authorities. The record shows that such control is asserted. The school officers did, in fact, testify that all sects would have equal rights, but by qualifying such statements they materially restrict equality of rights and the freedom of the various sects.

Conclusion.

The Appellant asks this Court to determine whether sectarian groups may be permitted to teach in public school buildings during school hours, and substantially as part of the public school system. If such teaching is permitted, Appellant asks if school authorities may be permitted to determine who shall teach and what may be taught.

Respectfully submitted,

WALTER F. DODD,
Attorney for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 90

PEOPLE OF THE STATE OF ILLINOIS EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, AND ELMER C. BASH AND ALICE J. BASH, AND WANDA I. BASH, A MINOR, BY ELMER C. BASH, HER FATHER AND NEXT FRIEND,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

APPELLANT'S REPLY BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 90.

PEOPLE OF THE STATE OF ILLINOIS EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, AND WANDA C. BASH AND ALICE J. BASH, AND WANDA I. BASH, A MINOR, BY ELMER C. BASH, HER FATHER AND NEXT FRIEND,

Appellees.

APPELLANT'S REPLY BRIEF.

JURISDICTION.

It is difficult to understand Appellees' position that jurisdiction does not exist because the assignment of errors in this Court (Tr. 281) is not in the same language as the errors relied upon in the Supreme Court of Illinois (Appellees' Brief, 2). In the state court two of the errors (2 and 3) assigned related to the state constitution and state statutes, and were finally determined by that Court. Upon the errors relied upon and discussed in printed brief and oral argument before the Supreme Court of Illinois,

the first alleged invalidity of the whole plan at issue as in violation of the Fourteenth Amendment; the 4th alleged further violation of the Fourteenth Amendment. The federal issues so presented are rephrased in the assignments of errors in this Court, with the omission of issues finally decided in the state court.

By quoting a separate sentence of Appellant's Brief opposing Motion to Dismiss Appeal (p. 3), Appellees seek to lay the basis for a false statement to the effect that Appellant admitted that her claim as to the use of school property and school funds was based solely on state constitutional and statutory grounds (Appellees' Brief, 147). A directly contrary statement is found on page 4 of Appellant's Brief opposing Motion to Dismiss Appeal. The errors relied upon for reversal in the Supreme Court of Illinois are printed on page 2 of Appellees' Brief. Errors (2) and (3) were based solely on the Illinois constitution and statute, and Error (1) related to and was the basis for discussion of the general problem as to the use of public schools for religious instruction. The matter is further discussed in the Brief for Appellant, pp. 2-5. That this is a taxpayer's action is admitted by Appellees (Appellees' Brief, 6). By error (1) in the Supreme Court of Illinois, Appellant as a taxpayer objects to uses of the public schools for religious education as violative of the Fourteenth Amendment, such uses necessarily involving the employment of public employees and the use of public property. Error (4), relating to the discretion of the school board violative of the Fourteenth Amendment, was said by the Supreme Court of Illinois not to have presented itself in the trial, although the record shows the contrary, but, it is obvious that, having taken this position, that court based its comments on federal issues upon Error (1). The issue of violation of the Fourteenth Amendment

through the plan in dispute meets the standard set by this Court in *Wilson* v. *Cook*, 327 U. S. 474.

Appellees, although they claim that the matter is not at issue in this case, devote a large portion of their argument to the claim that public money may be used for their purpose.

Appellees seek to establish that the Appellant has no right to complain of the infringement of the religious freedom of her son (Appellees' Brief, 6, 7, 117), nor to seek to establish unfairness as between religious groups (Appellees' Brief, 8, 9, 117). Their position may be summarized as a contention that Appellant can bring suit, but cannot challenge the plan at issue. It is unnecessary to discuss the cases which Appellees cite, for they do not support Appellees' position. Admittedly Appellant has an interest in and a right to bring this suit. This gives a right to raise the issues presented by the plan in controversy. *Tileston* v. *Ullman*, 318 U. S. 44 (1943), presented an entirely different situation in that the party bringing suit had no standing or interest therein.

The most important, and obviously the most erroneous, position of Appellees, is that the Appellant did not contend in the state court that there was a violation of the First Amendment (Appellees' Brief, 4, 5, 11). Page 19 of Appellees' brief indicates why the brief is largely devoted to the First Amendment. Appellant could not charge a state or local violation of a constitutional provision applicable only to Congress, although the Fourteenth Amendment is now "interpreted to make the prohibitions of the First applicable to state action abridging religious freedom." *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947).

THE FACTS.

Appellant adheres to every statement of fact in her brief. Each statement is accompanied by a reference to the transcript; is based thereon; and does not attempt to be a favorable construction of the facts of this case. It may, however, now be desirable to make several repetitions with special regard to the weight which appellees say (Appellees' Brief, 12) should be given to the facts found by the trial court and the Supreme Court of Illinois.

The Supreme Court of Illinois says that the religious classes are "conducted on a purely voluntary basis" (396 Ill. 29). The grade pupils were solicited on a "Please permit" card which the public schools distributed and collected through their teachers (Trans. 176, 94, 133, 147, 253). The appellant was advised by his public school teacher to have her son take the religious education course (Trans. 69, 135, 182).

Of 35 religious education classes in the public schools of Champaign, 32 were Protestant, and the more general practice with the Protestant groups is that they remain in their classroom, and that the public school teacher remain during the religious class (Trans. 91, 133, 137). This sponsoring by public school teachers would be denied by Appellees (Brief, 155). The three Catholic classes each went to another room—one to a basement room; one to a small music room; and one to a class room (Trans. 150-151). Appellees' argument would deny any advantage in having the usual class room, with the school teacher present (Appellees' Brief, 87).

Rev. Alva R. Cartlidge, Chairman of the personnel com-

mittee of the Champaign Council of Religious Education, testified that:

> "I would welcome the Lutherans but the council reserves the right in its cooperative movement with the Lutherans represented upon it that no prejudicial personalities or materials be put in the courses" (Trans. 162).

Appellees argue that there is no censorship or discrimination as to religious groups (Appellees' Brief, 161-162). This Court is asked to consider the above quotation, and, the quotations on pages 8 to 11 of Appellant's original brief, and also to consider the effect upon secular instruction if every independent religious group is given separate facilities and time within the school building and within school time. Of course public school teachers would not be available for each religious class. Any one acquainted with the public school system of this country must know of the confidence which pupils develop in a competent teacher, and of the influence which must be employed by such teacher. With such a teacher made an agent and sponsor in religious teaching, no human can avoid the development of religious influence. Dominant control by the dominant religions of the area cannot be avoided if teaching by religious groups is permitted as a part of the public school program.

The trial court found that:

> "The Jewish classes of course would deny the divinity of Jesus Christ. The teaching in the Catholic classes of course explains to Catholic pupils the teaching of the Catholic religion, and are not shared by other students who are Protestants or Jews. The teachings in the Protestant classes would undoubtedly from the evidence, teach some doctrines that would not be accepted by the other two religions" (Trans. 66).

Appellant's son, when the only person in his class not taking religious teaching, was, for some time left alone during the religious period, once in the hall and later in the music room (Trans. 177-178, 255). On testimony of students as witnesses, most of whom attended the larger Protestant Churches (Appellant's Brief, 28-29), the trial court apparently takes the view that there was no occasion for embarrassment

> "except in so far as there is any natural embarrassment to a child in being the only one in his room who did not take the religious education courses and who went out of the room to study by himself because of that fact" (Trans. 69).

This is the very embarrassment which caused the highest courts of Illinois, Iowa, Louisiana, Missouri and Wisconsin to hold religious services in public schools to be invalid, even though attendance was voluntary. The substantial difference between these cases and that here at issue is that the plan here involved advertises religious group memberships and failures to take religious courses. *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334 (1910); *Knowlton* v. *Baumhover*, 182 Ia. 691, 166 N. W. 202, 5 A. L. R. 841 (1918); *Herold* v. *Parish Board*, 136 La. 1034, 68 So. 116; *Harfst* v. *Hoegen*, 349 Mo. 808, 163 S. W. 2d 609, 141 A. L. R. 1136 (1941); *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 44 N. W. 967. The *Ring* case will remain the law of Illinois if the opinion of its Supreme Court in the present case is not sustained.

The trial court found that:

> "to some slight extent the defendant has indirectly appropriated public funds for the use of these classes, by the furnishing of rooms in public school buildings, light, heat, janitor service, and so forth * * *" (Trans. 70).

The services of school teachers and school officers is perhaps the most important expense. Appellees say that "two courts below, without dissent, determined that as a matter of fact the religious education classes did not increase the appellant's tax burden" (Appellees' Brief, 153). This should be compared with the trial court's statement which is quoted above.

Appellees object to appellant's remarks about conditions likely to present themselves under the plan here in controversy, and to her reference to an official document on "Race Relations in Chicago." They also object to suggestions by Appellant that this Court need not limit to Champaign, Illinois, its consideration of the conditions likely to develop under the plan (Appellees' Brief, 128, 137, 138). Appellant submits these matters to the Court without further comment. The issue here presented involves the nation. Appellees themselves say that the present case involves a great experiment on a nation-wide scale.

The Appellees also say that the law cannot protect atheists (Appellees' Brief 134); and that Jews and Catholics would be as much embarrassed at a school cafeteria as by being withdrawn from their school room because of religious lessons in the school—the Jews having no religious class to attend (Appellee's Brief, 136). This is for the Court to consider.

The First Amendment and Appellees' Argument That States May Establish Religion.

Appellees base a large part of their Brief (pp. 24-100) upon the view that the only provision of the Federal constitution applicable to the present case is that of the First Amendment which provides that:

> "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof * * *"

The argument, based upon the words "establishment of religion," is that these words, when applied to the states, mean merely that the states shall not discriminate among religions; but, that if it is to be construed otherwise, the phrase refers only to a nation-wide religion, and is not binding on the several states. This position is, of course, directly inconsistent.

Appellees summarize one of their positions by saying that:

> "We have pointed out in our argument on the meaning of the 'establishment of religion' clause of the First Amendment that no law, whether it imposes the tax or not, is invalid under such amendment unless in addition to or as a part of the imposition of the tax, it prefers one religion over another" (Appellees' Brief, 159).

To construe this language as applicable to states but not interfering with the equal state establishment of all religions, is perhaps not as consistent as it would be to construe the language as applying only to a nation-wide religion, and leaving the states free to set up such a religion as they should consider proper. Experience in all countries and in Champaign, Illinois, shows the incapacity to treat all religious groups equally, and the dominance of the larger groups. The plan defeated by James Madison, and found in an appendix to *Everson* v. *Board of Education*, 330 U. S. 72, may at the time have been regarded as conforming to Appellees' contention of equality.

It is clear that the First Amendment did not apply to the states, and that, after its adoption, state religious organizations continued in the states. This situation is well discussed in Greene, The Development of Religious Liberty in Connecticut (1905). Since the adoption of the Fourteenth Amendment and its extension to apply to free-

dom of religion, this Court has, more recently, held that the religious freedoms guaranteed by the 1st Amendment are also included in those guaranteed by the 14th Amendment.

The present case is not based on the 1st Amendment, but on the 14th Amendment, which incorporates, as to the states, the freedom of religion guaranteed by the First. It is not necessary, under the decisions of this Court, to find in the First Amendment all religious freedoms guaranteed by the Fourteenth.

But, in the present case, it is obvious that the prohibitions of the 1st Amendment fall within the 14th Amendment, and that the facts of the case bring it within the "establishment of religion" clause as defined in *Everson* v. *Board of Education*, 330 U. S. 1 (1946), pages 15-16. Appellees seek to narrow the use of the word "tax" as used in that definition (Appellees' Brief, 159), but there is no doubt of the Court's language applying to continued use of public facilities, even though there has been no computation of public cost or levy of a specific tax for the purpose.

The Appellees seek, in order to establish their objective, to make sure that a state be subject "only to the requirement that it treat all faiths, religions, sects and beliefs equally and without discrimination" (Appellees' Brief, 107); and they seek to have the "establishment of religion" clause of the First Amendment refer to a nation-wide religion, and not to be binding on the states (Appellees' Brief, 101, 115). They would permit official religious organizations by the states, and leave unaffected the prohibition of an "establishment of religion" by the United States. But, apparently, they would leave to this Court a determination whether public schools might assign too

long a period for religious education (Appellees' Brief, 160).

The Wall of Separation Between Church and State.

The church properly has, and must continue to have, an important share in the life of our people. But, if it takes over the public school system as the organ of religious education, it will, unless human characteristics fundamentally change, place the larger denomination or group in control within its area. It is not sufficient to say that schools are too far from the churches for students to go to them for education after being released from school, or that churches are too far from residential areas to provide week-end training. The Lutherans were able to provide religious teaching on Saturday morning (Trans. 122).

The church is an important organization, with functions largely of a charitable type, and subject generally to the same tax-exemptions as are charities and private schools. It may educate its own youth, subject to maintaining a standard comparable with that of the public schools. Appellant's original brief seeks to outline in a few pages certain of the relations between public schols and sectarian instruction (Appellant's Brief, 15-20). It may be well to indicate some of the established relations between church and state.

(1) *Business transactions may be made between church and State. Bradfield* v. *Roberts*, 175 U. S. 291 (1899), related to a contract for the treatment of poor patients by a hospital managed by Catholics, but with nothing sectarian in the corporation. Appellees seek to find something in this case which may define the phrase "respecting an establishment of religion" in the First Amendment

(Appellees' Brief, 77-78), but there was merely a contract with a non-sectarian corporation. *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908), is referred to by Appellees as sustaining payment to a Catholic organization of public funds for the education of Sioux Indians (Appellees' Brief, 80-82). The quotation from the opinion, made by Appellees (Brief, 82), shows a purely business transaction with funds belonging to the Indians, and the Court finding that:

> "we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof."

Contractual relations with churches, Catholic or otherwise, for services or property, are also recognized by the State of Illinois, as will be illustrated by the case of *St. Hedwig's Industrial School for Girls* v. *County of Cook*, 289 Ill. 432 (1919).

But business relations between churches and state lend no support to Appellees' contention in support of sectarian education in public schools.

(2) *Use of school building as a civic center, available for both religious and other groups, at other than school hours or at times when students are not using the property involved.* This matter was referred to in Appellant's Brief, page 15. Again, it lends no aid to Appellees' plan of sectarian education of school pupils in school buildings and during school hours.

(3) *Parochial and private schools.* Books—transportation—lunches. For many years attendance on parochial or private schools of equal standard has been permitted in

substitution for attendance of the public school; and since *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), parents are authorized to send their children to such schools. Such attendance is a financial burden upon the parents, and a distinct financial advantage to the local taxing body. Moreover, attendance of such a school does not relieve the government of its duty to the pupil. Such a duty has been met by furnishing and requiring the use of certain text books—the same text books thus being selected, for both public and parochial schools and being furnished free of charge.

More recently this Court has sustained an equality of treatment of students of the two types of schools, with respect to transportation. *Everson* v. *Board of Education,* 330 U. S. 1 (1947); and Congress has, by the National School Lunch Act (Chapter 281—Public Law 396; Approved June 4, 1946), adopted a plan of aiding pupils' lunches in both public and nonprofit private schools.

These public aids may be regarded not as aids to sectarian education, but as constituting an equality of treatment as to these matters, in partial payment for an obligation which must be met only in part. The parents are paying for the education, which is in part sectarian; and the governing body is paying several small amounts as elements in encouraging an education for which it is responsible except as to sectarian training.

The opinion in the *Everson* case makes it clear that it lends no aid to Appellees' plan of sectarian education of public school pupils in school buildings and during school hours.

(4) *Released time for religious education.* Appellees claim that their plan for religious education in the school, during school hours, ordinarily in the presence of the public school teacher, and with a segregation of religious

groups in the school, is supported by a plan of releasing students for a short time each week to attend a class of religious education, independent of the public school and not upon the school property. Appellees' Brief, pages 133, 155-157, devotes some attention to the released time plan, which is discussed at pages 16-17 of Appellant's brief. New York may be regarded as the leader of the plan of released time, and explicitly limits it to "outside of the school buildings and grounds." The Illinois Supreme Court has sustained a similar plan.

The released time plan is directly opposed to the plan at issue in the present case, and Appellees could get little encouragement even from *Gordon* v. *Board of Education of City of Los Angeles*, 178 Pac. 2d 488 (1947), which indicates initiative on the part of the Board of Education, encouraged by a liberal act of the California legislature in 1943 (Cal. Education Code, section 8286).

It is clear here, also, that the released time plan lends no support to Appellees' plan of sectarian education of public school pupils in public school buildings and during school hours.

Conclusion.

The issue of this case is one of freedom of religion restricted by sectarian teaching in the public schools, with such sectarian teaching as a part of the public school system, during school hours, in school rooms; with school teachers usually remaining as sponsors, though not as participants, when all students of the class register for religious teaching. The public school is the essential element for the religious teaching. This situation presents itself for the first time.

In order to accomplish their purpose, Appellees claim that states may establish religion, subject "only to the requirement that it treats all faiths, religions, sects and beliefs equally and without discrimination." It would rest upon the state or its local bodies to determine their religions and their equality of treatment, and a preliminary test presents itself in the present case, where it appears that perhaps 90 per cent of pupils and school teachers belong to certain Protestant groups.

If this Court sustains the plan now before it, it will make the public school system the organ of religious education, and will restore the religious situation of the colonies before the American Revolution.

Respectfully submitted,

WALTER F. DODD,
Attorney for Appellant.

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IN THE

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

APPELLANT'S SUPPLEMENTAL BRIEF.

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SCOPE OF APPELLANT'S SUPPLEMENTAL BRIEF.

Appellees' Supplemental Brief is in reply to briefs made available to both Appellant and Appellees on the day of oral argument before this Court. The briefs answered by Appellees deal with the whole case, and lay the basis for re-argument of all issues. Appellant must therefore deal

with the issues so re-argued. In view of the fact that the Attorney General of the State of Illinois filed a brief as *Amicus Curiae* in support of Appellees' position, some attention must also be given to that brief.

As to the Attorney General's argument upon the issues, it may suffice to say that the Attorney General construes the opinion of the Illinois Supreme Court in *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, as forbidding only compulsory attendance upon religious exercises in public schools, whereas the Court itself said that excusing a student from attending would subject him to a religious stigma and place him at a disadvantage in the school.

Jurisdiction.

Appellees seek to discuss the issue of jurisdiction (pp. 4-5), and say that they deem this question to be controlling. It may be well to mention the grounds on which Appellees have alleged that this Court has no jurisdiction:

(1) Appellees have alleged that Appellant did not raise in the State Supreme Court the issue of violation of the Fourteenth Amendment by use of public employees and public property (Appellees' Brief, 4). The Supreme Court of Illinois was of a different opinion (Trans. 271), and its language has no uncertainty, although it is in error in its indication that Appellant agreed that the religious program is voluntary.

(2) Appellees allege that Appellant's Brief opposing Motion to Dismiss Appeal admitted reliance only upon the validity under the state constitution of the use of public property for religious purposes (Appellees' Brief, 3). By error the word "appellant" appears instead of "appellees," at the beginning of the sixth line from the bottom of page 3 of that Brief, but it is clear that page 3 deals with state issues which do not come to this Court, and that page

4 deals with the federal issues directly involved in this case and specifically asserted in it.

(3) Appellees claim that Appellant has no rights as a taxpayer (Appellees' Brief, 6). The Supreme Court of Illinois recognized this as a taxpayer's action (Trans. 268). Although this Court does not entertain a suit by a taxpayer of the United States, it has systematically entertained suits to prevent the illegal use of money by a municipal body. This is indicated in the recent *Everson* case, and other cases are discussed in *Coleman* v. *Miller*, 307 U. S. 433, 445.

(4) Appellees' chief attack on jurisdiction is based on the fact that Appellant did not in the state courts rely on the First Amendment (Appellees' Brief, and Supplemental Brief, pp. 4-5). Appellant again asserts that her protection arises from the Fourteenth Amendment. No protection from the First Amendment arises directly against state action, although the prohibition of establishment of religion, under the terms of that Amendment, constitutes a portion of the protection of freedom of religion under the definition and application of the Fourteenth Amendment.

The brief of the Attorney General of Illinois seeks to restrict the jurisdiction of this Court in the present case by a claim that Appellant asked for and could receive only a total and absolute interdiction upon the reading of the Bible in any public school building under any circumstances. The language employed in Appellant's prayer for relief is broad, but may properly be construed as limited to the other provisions of her complaint. In any case the rule of Illinois law will apply. It was said in *People ex rel. City of Chicago* v. *Board of Review of Cook County*, 326 Ill. 124 (1927), page 141:

"Upon a petition for a writ of mandamus the court

> is not bound to grant it for all the relief asked but may grant the relief so far as relators show a right to it." Repeated in *Stockholm* v. *Daly*, 374 Ill. 441, page 451 (1940).

The issues presented to this Court by Appellant are all properly before this Court for consideration.

Issues of fact.

Appellees' Supplemental Brief (p. 3) says: "We refer the Court to the agreement in oral argument by counsel for both the Appellant and the Appellees that the trial court's opinion (Tr. 60-89) sets forth a full, fair and accurate summary of the material facts involved." The findings of fact by the trial court do not cover many of the important facts, and at no time did Appellant and Appellees agree upon such findings or upon a statement of facts. In reply to a question from the bench, counsel for Appellees agreed that the facts which he stated were largely in agreement with those stated by counsel for Appellant, but the greater number of these facts were not within the findings by the trial court, and such findings were in some cases not in accord with the record. Neither party has in any way been committed to the findings of the trial court. In *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 659, this Court stated the principle applicable to a case of this character:

> "In all cases coming to us from a state court, we pay great deference to its determinations of fact. But when the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained."

Appellees call attention to an erroneous citation of the transcript by the American Civil Liberties Brief with respect to opposition by some churches (Appellees' Supplemental Brief, p. 2); but substituted reference is not difficult as to the Unitarian Church (Trans. 217), and as to what appears to have been the difficulty of the Lutheran Church (Trans. 121, 162); and Appellees fully recognize the close religious relations of Urbana and Champaign.

Alleged voluntary character of the religious teaching.

The Appellees' Supplemental Brief devotes several pages to the alleged lawful use of the tax monies for the teaching of opinions with which the taxpayer disagrees, and alleges on page 12 that such a principle applies "whether on religious or on other grounds." Presumably a person could not be required to attend religious teaching, but could be required to pay for it.

We are here dealing with the use of public facilities for religious education in the public schools which the Supreme Court of Illinois says is "upon a purely voluntary basis."

The practice of religious instruction is somewhat as follows:

(a) The religious teachers come from outside—the Catholics from their church and the Protestants from the personnel Committee of the Protestants in the Champaign Council of Religious Education; (b) Pupils are registered through distribution to and collection from them by the public school teacher of Parents Request Cards, which ask that the parent will "please permit" attendance of the class, (Trans. 176); (c) Rooms for classes are determined by school authorities, who usually determine the regular public school class room if all or nearly all have registered; but there is no such possibility with respect to the

small number of Catholics, nor as to the Jews who now have no religious classes; (d) Where all or nearly all pupils attend the religious class, the public school teacher often remains in the room, but here again there is no such possibility with respect to the 3 small classes of Catholics (Trans. 92, 133, 137).

Solicitation by the regular school teachers and presence by such teachers at the religious lessons would, under the purely voluntary view, be free from the influence which school teachers usually have with their young pupils. Nor is weight given to embarrassment resulting from withdrawal from the room—in one case as to Appellant's son's withdrawal to sit alone in the corridor (Trans. 132). Attention may also be given to the fact that in this case the boy's teacher recommended to his mother that the son take the religious work (Trans. 69, 135, 182).

"Voluntary" religious action may be to some extent promoted by (1) solicitation by the public school teacher; (2) advice to the mother by such teacher; and (3) threat of embarrassment should the action not be taken.

The trial court recognized the embarrassment which came from one leaving the room (Trans. 69), and the statement by the Supreme Court of Illinois, in *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334 (1910), until recently the law of Illinois, is still a true statement supported by the highest courts of Missouri, Iowa, Louisiana and Wisconsin:

> "The exclusion of the pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated."

There is too much of such religious friction among younger pupils, which is the basis of the statement in the *Ring* case. The trial court found that:

> "The Jewish class of course would deny the divinity of Jesus Christ. The teaching in the Catholic classes of course explains to Catholic pupils the teachings of the Catholic religion, and are not shared by other students who are Protestants or Jews. The teaching in the Protestant classes would undoubtedly from the evidence, teach some doctrines that would not be accepted by the other two religions" (Trans. 66).

Anti-Semitic and anti-Catholic views may be trained into children at the age when such education is a danger not only to them but to the future of this Country. And such result will be accomplished by religious segregation in the grade schools, especially when some religious groups are in a small minority.

Attendance upon the religious classes may not be purely voluntary when the public school teacher solicits and advises, and when the child is subject to great embarrassment if he fails to join the class. These forces are more efficient when, as here, one religious group is clearly dominent.

Alleged equality of all religions.

Appellees' Supplemental Brief (pages 13-16) gives attention to the fact that control is in the hands of the Board of Education and not in the hands of the Champaign Religious Education Council. It is obvious, of course, that the Religious Education Council acts not as a body with independent governmental powers, but as a body operating with the Board of Education. The powers of the Council depend upon the Board, and, if permitted by the Board, the Council may exercise authority. It may be possible for the dominant religious group to have some influence with the school authorities.

The actions complained of by Appellant are those of the Board of Education performed either directly or through the Champaign Council of Religious Education.

Quotations by Appellees' Supplemental Brief, pages 13-16, do not quite cover the matters dealt with on pages 9-11 of Appellant's original brief. The Superintendent of Schools stated that "all the groups should work together" (Trans. 127). The Council was given power. The Jews and Catholics are members, but play a small part. There are nine Protestant churches of the larger type (Trans. 92, 129). Those not members were Lutheran, Christian Science, Unitarian, Jehovah's Witnesses, Quakers and Twin-City Bible Church. There were 35 classes in 1945 of which three were Catholic (Trans. 91, 150). There were no Jews; between eighteen and twenty-two Catholic students; and more than eight hundred Protestant students (Trans. 150, 258).

The president of the school board testified that all religious groups were to be treated alike (Trans. 127, 128), although he was referring at the time to members of the Council; and the Superintendent of Schools testified that "as far as I know;" class rooms are available to a person who believes in no religion, and that "The school buildings are now available to all religious denominations in this community to be used while they are being used by Students" (Trans. 117-119).

More recently the superintendent added that it would be hard "to work with a lot of different groups" and that "all the groups should work together" (Trans. 127). He would permit Jehovah's Witnesses but appeared to be in doubt as to saluting the flag (Trans. 118, 239).

The trial court found from the evidence that a group must make application to the superintendent of schools "who in turn will determine whether or not it is practical for

said group to teach in said school system" (Trans. 65). There is a discretion in the superintendent, which the trial court was correct in mentioning.

But the record shows a dominance of the Protestant members—of the Champaign Council of Religious Education in right to teach and in what is to be taught. The minister of the Lutheran Church met with the Council to suggest separate teaching of the children of his faith. He testified (Trans. 121):

> "When I offered this suggestion no action was taken on the part of the council, but I was assured that if and when there were sufficient children desiring instruction according to Lutheran faith time would be granted us."

Apparently there was doubt as to separate instruction for more than 25 children. A Presbyterian minister, who was chairman of the personnel committee of the Council testified:

> "I said that the Lutherans may participate in the organization and may teach in the schools too. I do not know whether they want to do so now or not. I said I heard it. I am ready to approve of them sending a teacher into the school. I would welcome the Lutherans but the Council reserves the right in its cooperative movement with the Lutherans represented upon it that no prejudicial personalities or materials be put in the course" (Trans. 162).

The Lutheran church could have continued its religious education on Saturday morning, but a smaller group of its character would be in difficulty unless it joined with the Protestant majority.

Even if it were assumed that each religious or non-religious group or individual has an equal right to give instruction as to its views in public schools and during school hours, it is obvious that such groups cannot be

treated equally, for several reasons: (1) There is not separate space enough for such teaching and for the regular school work; (2) except for a consolidation of religious groups, as among the larger Protestant groups in Champaign, there will not be pupils enough in each group for religious classes, and there will be a shortage of religious teachers who may meet approval of the superintendent of schools; Jewish teaching was abandoned for these reasons; (3) a mere presence and sponsorship of the public school teacher who obtained the child's registration for the religious training, and who lives with the child on every school day, has an essential effect upon the child; (4) the use of regular class rooms and removal therefrom of those not participating in the religious class subjects them to a religious stigma referred to by the Supreme Court of Illinois in the *Ring* case; and the transfer of small groups or of individuals from their regular school rooms establishes a sectarian grouping which often brings religious prejudices among children, especially with respect to a small group of Catholics in the basement, and one boy of the class being placed in the corridor.

The Jewish student will in all cases be taken from his class when his school room is to be used for religious education. And the Appellees have twice stated that:

> "The law does not protect against any social consequences of choosing atheism" (Appellees' Brief, 23, 134).

The superintendent of schools says that class rooms will be available to persons who believe in no religion, and Appellees give them a warning should they accept the superintendent's invitation.

It is obvious that a state establishment and maintenance of religion will give a control to the religious group that has the greater number of members, or to the groups which

may unite into a majority. And if religion is established by the state, Appellees have told this Court that the religious groups may take over the public schools.

"Separation of Church and State" as defined in the Everson case.

Unless the emphatic language in both the majority and minority opinions of this Court in the *Everson* case, directly applicable to the contentions made in the McCollum case now in this Court, is to be deleted, and the principles declared and precisely laid down and agreed to by all the members of the Court are now to be repudiated, the decision on the question of teaching religion in the public schools as now presented must inevitably be decided in favor of the Appellant on the authority of the only case in this Court directly in point.

Minority Opinion. In the opinion of Mr. Justice Rutledge, it is said that there are two great questions remaining in the process of separating Church and State required by the First Amendment, since the Fourteenth Amendment has been construed to make the First applicable to state action. One of these, the opinion states, is the use of the taxing power to support religious establishments, and the other is "efforts to inject religious training or exercises and sectarian issues into the public schools." In the latter part of the same opinion an even more direct statement is made. It is there said:

> "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools."

As support for this statement, there is cited among other things the note in 50 Yale Law Journal, page 917, which

discusses at some length the efforts threatening the separation of Church and State in this country (330 U. S., 14, 63).

Majority Opinion. The decision of Mr. Justice Black adverts also to these two drives in recent times. Mr. Justice Black states that the two questions which have most frequently arisen in connection with the separation of Church and State are:

> (1) Proposed state aid to parochial schools, and
> (2) Efforts to carry on religious teaching in the public schools in accordance with the tenets of a particular sect.

The language is:

> "In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect."

The Answer Indicated by Both Sides. Both the minority and majority forecast the answer to the question of religious teaching in the public schools.

Mr. Justice Rutledge for the minority speaks of it as a "threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands," and at page 34 of the opinion he says, speaking of the effort to obtain public funds in aid and efforts to introduce religious education into the public schools: "In my opinion, both avenues were closed by the Constitution."

Mr. Justice Black, speaking for the majority, said:

> "The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and Governments."

This language must be taken in connection with the careful explanation that the "establishment of religion" clause of the First Amendment is designed to secure the same "separation of religions and Governments" that is secured generally in the constitutional provisions of the various states.

The language can only mean that the state courts in deciding against religious teaching in the public schools have remained faithful to the doctrine of the separation of Church and State.

This language, "have remained faithful to the separation of religions and Governments," can only indicate approval of those decisions; but, to put the matter beyond doubt, in the discussion which follows there is the definite statement of what the First Amendment forbids, and it is said "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, or vice versa." In other words, the state cannot participate in the affairs of religious organizations, and religious organizations cannot participate in the affairs of the state, in whatever form they may adopt to teach or practice religion.

The Meaning of "Separation". In the light of this Court's interpretation of the First Amendment and the clear exposition of the significance of the expression "law respecting an establishment of religion" it is not too difficult to formulate a test of when there is or is not a true "separation of church and state"; nor is it an insuperable task to apply such test to any given case.

What the Constitution of the United States forbids and what the constitutions of all the states forbid though in different forms of expression, is the making of any law or the action of any governmental authority in pursuance of any law that involves the interlocking of the official func-

tions of the state (or any of its agencies) with the official or institutional functions of any church.

When a state acting through its legislature invites or employs a minister of the Gospel to deliver an invocation at the opening of sessions of the legislature, it is dealing with individuals qualified in its judgment to perform the services asked for; it is not dealing with any church as an institution or establishment; it is not making any contract, agreement or arrangement with any Catholic, Protestant or Jewish body in performance of its official religious functions; it is not giving a veto or vote or even any part to any institution outside the institution of government; nor is it giving such participation to any group, organization or association of church bodies, national, state or local.

So when the officials in charge of the activities of the armed forces select certain members of such forces to act as Chaplains, they are not making any agreement with any church organization or group of organizations.

So also when the state exempts from taxation all property used for charitable, cultural or religious purposes, it is not participating in the official functions of any institution or group of institutions or giving any one outside the government a "say so" in the affairs of government. No Catholic, Protestant or Jewish organized group is thereby given a voice in the affairs of government. Equally falacious is the hint that the absolute separation of church and state might in some way prevent our putting the words "In God We Trust" on the coins of the United States.

But there is an interlocking of Church and State when a Catholic, Protestant or Jewish institution, as an institutional function of its organization, makes a compact with a local public school board to handle the children assembled

under the jurisdiction of the school board in performance of its official function and in carrying out and implementing the laws for compulsory education, for the purpose of imparting their respective creeds of Catholicism, Protestantism or Judaism to such children while they are being held in school by the school board. And, of course, it makes no difference in principle, whether the compact is made and carried out by one of such organizations or a combination of any two or three of them.

Conclusion.

A state has no power to establish a religion or to maintain religious groups; and no power can be exercised in the effort to establish or maintain religion without giving an advantage to the religion or religions that are dominant. The aid to such religions through the resources of public schools constitutes in fact an establishment of religion which violates the Fourteenth Amendment both directly and as embracing the liberties guaranteed by the First Amendment.

Appellees not only admit but argue that their plan can be supported only by state establishment of religion. Such establishment is forbidden, and carries with it compulsion and inequality with respect to students who must attend the public schools, while at the same time promoting the interests of dominant religious groups.

Even if it were possible to establish state religion supported by taxation and with an effort in good faith to apply equal treatment to all sects, an equality cannot be maintained in any area in which a religious group has stronger organization and larger membership than others. Our constitution has forbidden both state and national religion for this reason. From the beginning of our

civilization religion has been the primary basis for war and other human friction, and public schools should not be employed to continue religious friction.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1374 90

PEOPLE OF THE STATE OF ILLINOIS, EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

JOHN L. FRANKLIN,
A. R. PETERSON,
OWEN RALL,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1374

PEOPLE OF THE STATE OF ILLINOIS, EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS,

AND

ELMER C. BASH AND ALICE J. BASH, AND WANDA I. BASH, A MINOR, BY ELMER C. BASH, HER FATHER AND NEXT FRIEND,

Appellees.

STATEMENT OPPOSING JURISDICTION WITH MOTION TO DISMISS

MAY IT PLEASE THE COURT:

In opposition to the jurisdictional statement of Appellant, the Appellee, Board of Education of School Dis-

rict No. 71, Champaign County, Illinois, respectfully represents:

I

The Judgment of the Supreme Court of Illinois Does Not Draw in Question "The Validity of a Statute of Any State" Within the Meaning of Section 237(a) of the Judicial Code.

Section 237(a) of the Judicial Code, 28 U. S. Code, Sec. 344, gives this Court jurisdiction of an appeal from the highest court of a State in a case "where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Neither the complaint nor the evidence in this case disclose any attack upon any statute enacted by the General Assembly of the State of Illinois. The Appellant has taken this appeal on the theory that the *action* of the Appellee, Board of Education, constitutes "a statute of any State". It is impossible to cull from the record in this case any "statute" or any order, regulation or resolution equivalent to a statute. Neither the complaint nor the evidence contain any resolution, order or regulation of the Board of Education which is claimed to violate constitutional rights of the Appellant. In Appellant's jurisdictional statement a reference is made to minutes of a meeting of the school board (Printed Abstract of Record, p. 164). The record at this point does not contain the minutes. Neither do these minutes appear in any other portion of the record and what these minutes contain is wholly undisclosed by this record.

A careful examination of the complaint (Abstract, pp. 1-44) fails to disclose any regulation, order or resolution of the school board which is claimed to be invalid. In fact,

the gravamen of the complaint is not that invalid regulations have been adopted but that (Abstract, p. 21) "the defendant has ever refused and failed, and yet does refuse and fail, to adopt or enforce any rule or regulation prohibiting instruction in religious education in said public schools". This is followed by the prayer that the Court issue a writ of mandamus to the Board of Education "ordering it to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education" etc. (Abstract, p. 21).

This Court held in *King Manufacturing Co.* v. *Augusta*, 277 U. S. 100 (1928) that a city ordinance was a "state statute" within the meaning of Section 237(a) of the Judicial Code. Mr. Justice Brandeis, with whom Mr. Justice Holmes concurred, dissented at length on the ground that when the Act of February 13, 1925 (28 U. S. Code, Sec. 344) struck from Section 237 of the Judicial Code the words "or an authority exercised under any state", the amendment deprived this Court of jurisdiction (on the then writ of error) of cases involving the validity of city ordinances.

In *Hamilton* v. *Board of Regents of University of California*, 293 U. S. 245 (1934) this Court entertained an appeal challenging the constitutional validity of a formal "order" of the regents of the University of California requiring able-bodied students to take military training during their freshman and sophomore years. The Court said (p. 258):

> "The meaning of 'statute of any state' is not limited to acts of state legislatures. It is used to include every act legislative in character to which the State gives sanction, no distinction being made between acts of the state legislature and other exertions of the state lawmaking power".

In support of this statement the Court cited *King Manufacturing Co.* v. *Augusta*, 277 U. S. 100 (1928) and *Sultan*

R. & Timber Co. v. *Department of Labor & Industries*, 277 U. S. 135 (1928). (The *Sultan* case was described by the Court in the *Sultan* opinion as one "brought to restrain the enforcement of an order, legislative in character, made by a state bureau"). In the *Hamilton* opinion this Court then concluded (p. 258):

> "It follows that the order making military instruction compulsory is a statute of the State within the meaning of Section 237 a."

No act of the Board of Education, either legislative in character or otherwise, is set up or challenged in this case. The challenge is rather directed against the result of failure to legislate.

In the recent case of *Wilson* v. *Cook*, 327 U. S. 474 (1946) this Court held that the mere objection to an exercise of authority (the levying of a tax) under a statute, whose validity is not attacked, cannot be made the basis of an appeal. Even more clearly in our case, the attack on the *result* of the inaction of the Board of Education is not an attack on any statute.

By no stretching of language can the actions or inactions of the Board of Education complained of in this case be considered "a statute of any state". The relator's grievance was that the Board of Education had refused to enact regulations, not that it had "legislated" in a manner not in harmony with the Federal Constitution. We suggest that this Court has never construed Section 237 of the Judicial Code to extend to complaints of inaction on the part of a State and that such an extension would be even less reasonable in view of the 1925 amendment to Section 237 of the Judicial Code eliminating the words "or an authority exercised under any state". We further suggest that entertaining this appeal will break down the limitations sought to be placed by the 1925 amendment on appeals to

this Court allowable as a matter of right. A holding that the permissive use such as we have in this case constitutes a statute would permit the obligatory review on appeal of almost any act or inaction of a quasi-legislative body. Neither the language nor the logic of any previous case in this Court sustains the argument that the action or lack of action of the Board of Education—whether or not embodied in a resolution, the text of which is not shown in the record—is "a state statute".

Motion to Dismiss

WHEREFORE the Appellee, Board of Education of School District No. 71, Champaign County, Illinois, now comes and moves this Court to dismiss the appeal of the Appellant, People of the State of Illinois ex rel. Vashti McCollum, for the reason that there was not in this case "drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

II

Treating the Appeal Papers as a Petition for Certiorari, the Writ Should Be Denied

A writ of certiorari should be denied here because (1) there is no substantial Federal question presented and (2) the judgment below is clearly correct on all questions arising under the Federal Constitution which were presented to and decided by the Supreme Court of Illinois.

The religious education classes of which relator, Vashti McCollum, complains are conducted by teachers employed by the Champaign Council on Religious Education (Abstract, pp. 153, 165) and without any expense to the school district (Abstract, pp. 164-165, 202, 210, 306). The classes

are entirely voluntary and are attended only by pupils whose parents authorize it in writing and designate the class to be attended (Abstract, pp. 152, 168). Additional groups, even atheists, are to be freely permitted to participate in the program on the same terms (Abstract, pp. 152, 154, 205). Lesson materials and curriculum are selected by a committee to avoid any offensive, doctrinal, dogmatic or sectarian teaching (Abstract, pp. 202, 203, 206, 209). The teaching to the Protestant group is of the content of the Bible without interpretation or attempt at influencing belief in the doctrines or creeds of any church (Abstract, pp. 136-137, 138, 184, 201, 205-206, 208, 291). The Jewish teaching, with only Jewish children present during the years that that group held classes, was in accordance with the Jewish beliefs (Abstract, p. 294). The Catholic teaching, with only Catholics present, is in conformity with the Catholic faith (Abstract, p. 195).

Upon requestion of the parents, pupils are released from their public school work to attend these classes in religious education, a plan approved in *People ex rel. Latimer* v. *Board of Education*, 394 Ill. 228, 68 N. E. 2d 305 (1946). That case approved and followed a similar holding in *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, 156 N. E. 663 (1927). The difference between the situation in the *Latimer* case, involving the Chicago schools, and the present case is that in the *Latimer* case the pupils went to nearby churches for instruction. Because of the distance of church buildings from the Champaign schools (Abstract, p. 204) and the hazard from traffic to which the children would be exposed, the classes are held in school rooms which are not otherwise in use (Abstract, pp. 204, 310).

The unanimous opinion of the Illinois Supreme Court carefully lists the constitutional objections urged before it by the Appellant (396 Ill. 14, 18-19, 71 N. E. 2d 161, 163).

No objection was made in that Court under the First or Fourteenth amendments to the use of public school property. Hence the question is not presented by this case, whether the use of school rooms for religious education classes is an aid to religion prohibited by either or both of those amendments. Compare *Everson* v. *Board of Education*, decided February 10, 1947, October Term 1946, No. 52.

The attack on the use of public property was based solely upon Section 3 of Article VIII of the Illinois Constitution which provides:

> "Neither the general assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose."

Both the three judges of the trial court and the Supreme Court of Illinois were unanimous in finding as a matter of fact that no public expense was incurred because of the religious education classes and that the wear on the furniture was negligible and would be disregarded under the doctrine, *de minimus non curat lex* (396 Ill. 14, 24-25, 71 N. E. 2d 161, 166).

The specific inhibition in the Illinois constitution against any appropriation or payment of public funds in aid of a church or sectarian purpose is as stringent as any restriction that can be spelled out of the First and Fourteenth Amendments. However, the court below was not called

upon to determine whether the merely incidental use of school property is absolutely prohibited by the establishment-of-religion clause of the First Amendment. That point was not made in that court. Therefore, the court below considered the use of school buildings only in connection with the charge made before it that such use violated the Illinois constitution. While the decision on the Illinois constitution is persuasive that the permissive use of school premises involved here does not violate the First and Fourteenth Amendments, that was not the question before the Court.

Whether the court below properly interpreted its own state constitution is not a Federal question but is a question of local law and is, therefore, not a ground for granting of certiorari.

Porter v. *Investors Syndicate*, 287 U. S. 346, 347 (1932);
Des Moines Nat. Bank v. *Fairweather*, 263 U. S. 103, 105 (1923).

The constitutional questions under the Federal Constitution which may be urged in this Court are limited to those presented to and decided by the court below. Thus, in *Wilson* v. *Cook*, 327 U. S. 474 (1946), this Court, quoting *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 317, stated (p. 362):

> "In reviewing the judgment of a state court, this Court will not pass upon any Federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented."

The claim that the use of school premises is in some manner a violation of the First and Fourteenth amendments was not presented to the court below and hence need not be

discussed here. The Appellant did contend that the existence of religious education classes was a deprivation of religious liberty of her son, James Terry McCollum, because, Appellant argued, there was pressure to enroll in the the classes so that enrollment was not voluntary and because there was social discrimination against those who did not join. In this aspect of the case she did contend that these voluntary classes were an infringement of the First and Fourteenth Amendments and also of Section 3 of Article II of the Illinois constitution which provides:

> "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions; * * *. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

Section I of the Fourteenth Amendment provides in part:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We submit that no substantial Federal question is presented on this branch of the case.

The charge and the evidence of the supposed embarrassment to the Appellant's son cannot be understood without

referring to the fact that Appellant and her son are avowed atheists (Abstract, pp. 237-238, 267). Appellant's son testified that he had told his "cub scout" friends about his atheism and was teased about it, but he was not teased about not taking religious education (Abstract, pp. 237-240).

The Supreme Court of Illinois held (396 Ill. 14, 22, 71 N. E. 2d 161):

> "In the instant case, the religious education classes are voluntary and are not part of the public-school program, and pupils are excused from their public-school classes while attending the classes in religious education."

It also held that no stigma was attached to the Appellant's son because he did not take religious education. The trial judges had made the same finding (Abstract 84, 86-88) and the evidence supports such holding (Abstract, pp. 175, 239-240, 312, 313, 320, 327, 333-334, 336, 337, 338, 340).

There is no evidence whatever that the voluntary system does "classify" or "segregate" children into religious and non-religious groups. One student in five in the grade schools and four students out of five in the junior high schools did not take religious education (Abstract, p. 330). Numerous students who did not take religious education testified that they did not feel the slightest embarrassment at not participating or feel the slightest coercion to participate. Those who do not participate are motivated by many reasons. Many such students are church members. Some do not attend because they get all the knowledge of religion they wish from other sources. Some are too interested in, or behind in, their school subjects to spare the time. One, Appellant's son, is an atheist and his mother desires to avoid exposing him to the religious education classes because of her atheism. Thus, boys and girls who do not enroll

in the classes fall into a conglomerate mass. Failure to participate stamps no one an atheist, discloses no religious scrupples, assigns no reason. The classes are not compulsory, subject to a student's being excused, but are wholly voluntary in each instance, admission thereto being limited to those making written application.

The unsoundness of Appellant's position in contending that the mere presence of these voluntary classes is a violation of her son's religious liberty, which she says arises from the fact that religious differences are pointed out and segregation, ostracism and embarrassment result, is demonstrated by the ridiculous conclusions to which the line of argument leads: No flag salute may be permitted in a public school because those asking to be excused from participating will expose their religious views. No cafeteria may be operated in a public school because in refusing pork, or in refusing all meat on certain days, students may disclose religious beliefs. The national anthem and "America" and "God Bless America" may not be sung for they recognize a Deity and an atheist refusing to join in singing may perchance thereby expose his irreligious views.

In *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943) this Court held that school children could not be compelled against their will to salute the American flag and recite an oath of allegiance to the Nation. Opposing counsel would now extend the holding of that case so as to prohibit the flag salute altogether in order not to expose religious differences. Such an argument carries the claim to religious freedom to an absurd length, and in the present instance collides with the religious liberty of parents and students who approve the classes in religious education.

Since the classes in religious education are entirely optional, they do not violate religious freedom: *Hamilton* v.

Board of Regents of University of California, 293 U. S. 245 (1934).

The voluntary plan which is involved in this case, fostered by persons outside of the public school system and without expense to the public, so clearly does not violate the religious liberty of the Appellant secured to her by the First and Fourteenth Amendments that no substantial Federal question is involved and certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 90

PEOPLE OF THE STATE OF ILLINOIS Ex Rel. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, and ELMER C. BASH and ALICE J. BASH, and WANDA I. BASH, a minor, by ELMER C. BASH, her father and next friend,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

APPELLEES' BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 90

PEOPLE OF THE STATE OF ILLINOIS Ex Rel. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, and ELMER C. BASH and ALICE J. BASH, and WANDA I. BASH, a minor, by ELMER C. BASH, her father and next friend,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

APPELLEES' BRIEF

JURISDICTION.

The Court has noted probable jurisdiction of this case notwithstanding our previous motion to dismiss the appeal. This motion is now renewed.

The noting of probable jurisdiction by this Court does not broaden the issues to be decided here. Those issues are still limited to the errors assigned by the appellant in the

Supreme Court of Illinois and by Findings of Fact passed upon by that Court.

Rule 39 of the Supreme Court of Illinois requires in part that the brief of the appellant contain "a brief statement of the errors or cross-errors relied upon for a reversal" (393 Ill. 47). The statement of errors formed the issues in the Supreme Court of Illinois (*Pickard* v. *Rice,* 391 Ill. 615, 617, 63 N.E. 2d 743, (1945); *Harper* v. *Sallee,* 376 Ill. 540, 546, 34 N.E. 2d 860 (1941)) and the Court passed upon each of those issues and no others.

The opinion of the Court below first sets forth the four errors there urged by the appellant*. (Tr. 270; 396 Ill. 14, 18-19; 71 N.E. 2d 161, 163) and then discusses them

---

*These four errors appeared on page 7 of appellant's brief in the Court below as follows:

ERRORS RELIED UPON FOR REVERSAL.

(1) The segregation of public school pupils into sectarian groups for the purpose of instruction in a public school is violative of federal and state constitutional guarantees of freedom of religion—the Fourteenth Amendment, and Article II, Section 3 and Article VIII, Section 3, of the Constitution of Illinois.

(2) The use of public funds for sectarian education violates Article II, Section 3 and Article VIII, Section 3, of the Constitution of Illinois, and Section 15-14 of the School Code of Illinois.

(3) Sectarian teaching of public school students in public school buildings during school hours is violative of Section 6-43 of the School Code of Illinois.

(4) The discretion of an administrative body and officer in this case is violative of Article II, Section 2, and Article III of the Constitution of Illinois, and is violative of the guarantees of due process of law and equal protection of laws by the Fourteenth Amendment to the Constitution of the United States.

seriatim (first error, Tr. 271-274; second, Tr. 274-275; third, Tr. 275-278, and fourth error, Tr. 278-279.)

By way of conclusion (Tr. 270), the Court below stated that the "simple question" before it was whether "either the Federal or State constitution, or both, *in their guaranty of religious freedom,* prohibit voluntary religious classes in the public schools under the plan as disclosed by this record". (Italics ours.)

It was after deciding the four specific questions and obviously referring to them that the Court held, generally, that there had not "been any violation of State and Federal guaranties". (Tr. 279.) This statement was a summary of the Court's decision and did not enlarge the issues passed upon.

The appellant in this Court sets forth three "Errors Relied Upon", which bear little if any resemblance in language or content to her "Errors Relied Upon For Reversal" in the State court. A reference to these errors she now relies upon (Appellant's Brief, p. 13) will be sufficient to show that they are a generalized and indefinite invocation of both the "establishment-of-religion" and "freedom-of-religion" clauses of the First Amendment and of the "due process" and "equal protection" clauses, and perhaps even the "privileges and immunities" clause, of the Fourteenth Amendment. No attempt is made by appellant to separate claims arising under one, from claims arising under others, and it is impossible to ascertain on which constitutional provision appellant relies for protection of any particular claimed right. Because of this it is necessary for us, in the interests of clarity and precision, to list the separate Federal questions raised or touched upon by the appellant. If we have erred in formulating this list it has been to broaden and expand these questions, rather

than to restrict them. We shall follow this classification in our discussion of both jurisdiction and merits.

The four possible Federal questions which might be considered here are:

First: Does the plan of using the school premises, because of the traffic hazard of sending the students to church buildings for released-time religious education, violate the establishment-of-religion clause of the First Amendment? (This question was neither raised nor decided below and may not be raised here for the first time.)

Second: Does the voluntary Champaign plan of religious education violate the freedom-of-religion clause of the First Amendment? (We contend that the Appellant suing as a taxpayer in her own behalf or vicariously in her son's behalf is not entitled to raise this question.)

Third: Do the facts that public school teachers handle parents' request cards and that school rooms are used, rent-free, for a few hours a week constitute a taking of property of appellant, as a taxpayer, for a private use in violation of the due process clause of the Fourteenth Amendment? (This question was not raised or decided below and, again, is not open to decision here.)

Fourth: Does the delegation of discretionary authority to the school superintendent and the claimed possibility that school authorities will in the future refuse to allow use of school facilities by certain religious groups constitute a violation of the Fourteenth Amendment? (The appellant cannot raise this point because the question is moot since there has not been and may never be any wrongful exercise of discretion.)

The opinion of the state court shows clearly that only the second and fourth of these Federal constitutional questions were raised below. By her first claim of error, below,

she alleged that the program violated her son's freedom of religion, and by the fourth that it violated the Fourteenth Amendment because of a supposed delegation of an unlawful discretion to an administrative officer.

That the first and third questions stated above were not raised below has already been admitted in this court. On page three of the appellant's brief on the motion to dismiss she stated:

> "Appellees further allege that Appellant did not rely on the First Amendment in presenting the case to the Supreme Court of Illinois, which obviously she did not".

Also, to appellee's previous contention that only the state constitution and not the Federal constitution was relied on in the state court as invalidating the use of public property for religious purposes, appellant replied (Brief Opposing Motion to Dismiss, p. 3):

> "Appellant [Appellee], however, is in error in saying that 'the attack on the use of public property was based solely upon Section 3 of Article VIII of the Illinois Constitution'. Weight was largely placed upon the State Statute."

There was thus no contention in the Illinois Supreme Court that either the Fourteenth Amendment or the First Amendment were violated by the use of school property. The effort to inject such an argument into the case at this stage is an afterthought generated by dicta in this Court's opinion in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1 (1947).

As to such second constitutional question it is to be noted that the sole petitioner was Vashti McCollum. She is the mother of James Terry McCollum, a school child involved in this controversy. It is his religious freedom which is alleged to have been violated. No claim is made

in this Court, nor was any claim made in the Illinois Supreme Court, that the petitioner's own religious freedom was restricted or violated.

The relator has no right as a taxpayer to complain of an infringement of the religious freedom of her son. The constitutional rights of citizens are personal, and it is a well-recognized rule that the constitutionality of a statute may only be attacked by one who falls within the class of persons upon which the law acts or operates, and not merely because it is unconstitutional as applied to others.

Cronin v. *Adams*, 192 U.S. 108, 114 (1904).

Hatch v. *Reardon*, 204 U.S. 152, 160 (1907).

The Winnebago, 205 U.S. 354, 360 (1907).

Standard Stock Food Co. v. *Wright*, 225 U.S. 540, 550 (1912).

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Henneford v. *Silas Mason Co.*, 300 U.S. 577, 581 (1937).

Premier-Pabst Sales Co. v. *Grosscup*, 298 U.S. 226, 227 (1936).

The Illinois rule is the same—*Schreiber* v. *Cook County*, 388 Ill. 297, 58 N.E. 2d 40 (1944).

"Constitutional questions are not dealt with in the abstract"—*City of Elmhurst* v. *Buettgen*, 394 Ill. 248, 254, 68 N.E. 2d 278 (1946).

This rule is also applicable to complaints against administrative action. To invoke judicial power to determine the validity of executive action, one must show that he has sustained or is immediately in danger of sustaining a direct injury, and it is not sufficient that he has merely a general interest common to all members of the public.

Ex parte Levitt, 302 U.S. 633, 634 (1937).

That the appellant may not challenge the constitutionality of the Champaign plan on the theory that it violates her son's religious liberty is crystal clear from *Tileston* v. *Ullman*, 318 U.S. 44 (1943). There a licensed physician challenged the constitutionality of a Connecticut statute prohibiting him from prescribing the use of contraceptive devices for married women in cases where pregnancy would endanger life or health. He alleged that the statute would prevent his giving such professional advice to three patients whose condition of health was such that their lives would be endangered by child-bearing, and set out such danger in detail.

This Court said in a per curiam opinion (p. 46):

> "We are of the opinion that the proceedings in the state courts present no constitutional question which appellant has standing to assert. The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's but his patients'. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf. [Citing numerous cases]".

On this branch of our case, we would paraphrase the above language by saying:

> The attack under the freedom-of-religion clause of the First Amendment refers obviously not to appellant's religious liberty, but to her son's. There is no allegation or proof that appellant's religious liberty is violated. Her son is not a party to this proceeding and there is no basis on which to say that she has standing to secure an adjudication of her son's constitutional right, which he does not assert in his own behalf.

For the reasons given, the claim of the appellant that her son's religious liberty is violated does not present to

this Court any justiciable question under the freedom-of-religion clause of the First Amendment.

The remaining available point relates to the alleged unlawful delegation to the Board of Education and superintendent of schools of authority to allocate school rooms for religious education and to approve the teaching personnel. This claim sets up a straw man. Nothing whatever was said in the pleadings with reference to it and the only evidence giving it any color whatever is that referred to on pages 10 and 11 of appellant's brief. We leave for later discussion the evidence of the extent and nature of the control which the school authorities suggested that they had the right to exercise. The curriculum is not controlled by the school board, but by the organization employing the teacher.

The supposed delegation of legislative power to the school board or to the superintendent does not of itself raise a Federal question—*Highland Farms Dairy* v. *Agnew*, 300 U.S. 608 (1937). In that case, a Virginia statute delegating power to a Milk Commission to create market areas and establish maximum and minimum prices was assailed on the ground that the grant of discretionary power passed the limits of lawful delegation. This Court said, by Mr. Justice Cardozo (p. 612):

> "The Constitution of the United States in the circumstances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an act of Congress. How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. Nothing in the distribution here attempted supplies the basis for an exception. The statute is not a denial of a republican form of government. Constitution, Art. IV, sec. 4. Even if it were, the enforcement of that guarantee, according to the settled doctrine, is for Congress not the courts [citations]".

In accordance with the above authority, no Federal question is presented by appellant's argument that discretionary authority is vested in the superintendent of schools since no abuse of any discretion is alleged. Appellant must show that the exercise of discretion by the superintendent of schools deprives appellant of a constitutionally guaranteed right. This appellant fails to do. For instance, appellant's claim that the school authorities will "censor" religious views present no Federal question in the absence of evidence that they have already done so to the appellant's detriment. To complain of an unconstitutional law one must be the victim of it. *Lehon* v. *City of Atlanta*, 242 U.S. 53, 56 (1916). In that case a Louisiana citizen was convicted of failing to get a license as a private detective. Without having applied for a license, he contended that the ordinance requiring it was unconstitutional because local officers had refused to issue licenses to nonresidents of Georgia. This contention was rejected. A unanimous court, by Mr. Justice McKenna, said in conclusion (p. 56):

> "To complain of a ruling one must be made the victim of it. One cannot invoke to defeat a law an apprehension of what might be done under it and, which if done, might not receive judicial approval".

To the same effect is *Bourjois* v. *Chapman*, 301 U.S. 183, 188 (1937).

On the question of this Court's jurisdiction, the only relevant consideration is that no attempt has been made by the school board and school superintendent to exercise any discretion whatever except freely to grant use of the school premises to every religious organization that has sought such use. It affirmatively appears in evidence that no request of any person, religious or irreligious, has been denied (Tr. 119, 120, 159; Trial Ct. Op., Tr. 66). Recognizing this state of the record, appellant based her third

assignment of error in this Court (Appellant's brief, pp. 13-14) not upon evidence that she or, indeed, anyone has been denied the free and equal use of school buildings, but, upon the mere supposition that in the exercise of their discretion, the school authorities will some time in the future deny her or someone such free and equal use of school facilities. This is obviously an attempt to invoke the jurisdiction of this Court upon a moot and supposititious question.

It has been established beyond cavil that in order to raise a constitutional question one must show that his constitutional right has been violated or threatened.

Since it is only the *acts* of the school authorities which are here challenged, the only question presented is whether those specific acts have violated the constitutional rights of the petitioner.

That no action taken by the Board of Education constituted an unlawful discrimination is clear. The Illinois Supreme Court found as facts that the Board of Education had made no choice among sects (Tr. 278) and that it had not exercised any discretion in reference to the powers granted (Tr. 278-279).

Precedents holding that in certain types of cases persons adversely affected by a statute may assert every ground of its invalidity are not relevant where validity of administrative conduct, only, is involved. The appellant relies upon *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) and *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) (Appellant's Brief, pp. 32-33). However, in both of these cases petitioners had been arrested under a statute or ordinance. Upon the petitioners' arrest in the cited cases, the constitutionality of the statute or ordinance was obviously a matter of direct concern to the petitioners. Neither a statute of

general application, nor an arrest or other direct violation of the appellant's rights, is involved in the instant case.

The above discussion disposes of the only Federal questions which were decided in the Court below. It is true that other matters are argued by the appellant in this Court but these are not preserved for review because they were not argued or decided by the Illinois Supreme Court. Thus, the claim that the use of school buildings violates the establishment-of-religion clause of the First Amendment was neither made nor decided in the Court below and is not available here—*Wilson* v. *Cook*, 327 U.S. 474 (1946). In that case this Court quoted (p. 483) with approval from *New York ex rel. Cohn* v. *Graves*, 300 U.S. 308, 317, a sentence which is precisely applicable to our case:

> "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented."

The cases just cited make it clear that a decision under the freedom-of-religion clause of the First Amendment below does not reopen the case to a consideration of the establishment-of-religion clause which was not even mentioned below.

The appellant's original petition for mandamus was sufficient to raise the establishment-of-religion question (Tr. 4, p. 11; Tr. 8, par. 24), but the question was never raised in the Illinois Supreme Court (see the assignments of error, footnote, p. 2, above) and hence was abandoned —*Harper* v. *Sallee*, 376 Ill. 540, 34 N.E. 2d 860 (1941) holding (p. 546) that an appellant may only rely on the points stated by him as grounds for reversal.

That this is the state of the record was admitted by the appellant in her brief on the motion to dismiss (p. 3).

For the above reasons, no substantial Federal question which is open to consideration by this Court is here presented, and the appeal should be dismissed.

STATEMENT OF FACTS.

The importance of our setting forth a clear and uncolored statement of facts is highlighted by a liberal resort to semantics on the part of appellant. References to voluntary separation of children as "segregation", calling a distribution of cards on which parents may indicate that they want their children to attend religious education classes "solicitation", and describing the approval of the schedule of classes and the approval of teachers as "censorship" do not lead the Court to a correct understanding of this case.

The following statement of facts summarizes the evidence upon which the decision of this case must be based. All material facts stated below were unanimously found by the trial court of three judges and the Supreme Court of Illinois. For the convenience of this Court, we have keyed the more important facts to the transcript pages where findings made by these courts appear.

The plan involved in this controversy is a form of the weekday released time religious education program, which had its inception about thirty years ago in the city school system of Gary, Indiana, and which has enjoyed a remarkable growth until at the time of the trial of this case it was in operation in differing forms in over 1,000 school districts in 46 states (Tr. 160). Current estimates are that about 2,000,000 children participate in such programs.

Because the need for religious education has been widely recognized and the initiation of local programs has been spontaneous, the local movements are not unified into any national system or standardized program, and each community has introduced many variations dependent upon local conditions and needs. Nevertheless, some features of the plan are common throughout the nation. These include release of school children, upon request of their parents, from the jurisdiction and control of school authorities and from participation in the school curriculum, for periods not exceeding one hour per week. During this period a voluntary association, usually made up of representatives of all religious faiths in the community, provides teachers and lesson materials and conducts a course in the study of religion on an educational level at least equal to that of the school from which the children have been withdrawn. The object is to acquaint children with the history and factual content of religion on the same basis as other subjects such as philosophy, economics or history are taught in the school program, thus affording them a true and balanced picture of the relative place and importance of religion in life.

The obvious advantage that has accrued to agnosticism and atheism, as a result of secularism in public education, is thus sought to be checked and a proper balance restored to the competing ideas of atheism and religion, and of material values and spiritual values.

Religious teaching is not conducted as a part of the public school system. The participation of the school authorities is the temporary release of children from their control and jurisdiction while such children are voluntarily participating in the study of religion. As is the case in the program here under consideration, in some communities school buildings are used for these classes because of

the unavailability or impracticability of using other facilities. The school board does not participate in the plan in any other way. The plan is one formulated and carried out by the participating religious groups, not by the school board.

The plan was initiated in the City of Champaign, Illinois, in the fall of 1940, following a local increase in juvenile delinquency. As a measure intended to combat it (Tr. 158; Trial Ct. Op., Tr. 61), the Champaign Council of Religious Education, a voluntary association of Jewish, Roman Catholic, and Protestant faiths, was formed, and immediately sought of, and secured from the defendant Board of Education, permission to offer classes in religious education in grades 7 through 9 (later expanded to grades 4 through 9) throughout the Champaign school system (Tr. 157-158; 128-129; 127-128; Trial Ct. Op., Tr. 61; Ill. Sup. Ct. Op., Tr. 268).

The plan formulated and carried out by the Council of Religious Education envisaged furnishing instructors having educational background and experience at least equal to the standard established by the Board for its own teachers (Tr. 118) and all materials and books, as well as incidental expenses, at the expense of the Council (Tr. 118; Trial Ct. Op., Tr. 64, 70; Ill. Sup. Ct. Op., Tr. 268, 269, 272, 275). Children were to be admitted to these classes only upon the express written request of parents and then only to classes designated by the parents (Tr. 117, 130; Trial Ct. Op., Tr. 62; Ill. Sup. Ct., Tr. 268). They were to be excused by the Board from participation in the public school program and attendance in the grade schools (grades 4, 5 and 6) for 30 minutes and from the Junior High School (grades 7, 8 and 9) for a period of 45 minutes in each week, for participation in the religious education classes (Tr. 91; Trial Ct. Op., Tr. 62; Ill. Sup. Ct. Op., Tr. 268, 272).

Schoolrooms, not required for school purposes, were to be made available for use by the religious education classes because of the traffic hazards involved in transferring children to other available buildings remote from school buildings (Tr. 158, 242) and classes were to be scheduled so as not to interfere with the regular public school classes (Tr. 111, 112; Trial Ct. Op., Tr. 65; Ill. Sup. Ct., Tr. 277) after consultation with the public school teacher. Each faith, Catholic, Jewish and Protestant, was to have its separate instructional classes (Tr. 127-128, 118) and every group, religious and unreligious, was to be admitted on equal terms (Tr. 118, 119, 120; Trial Ct. Op., Tr. 62); and no expense in connection with the classes was to be borne (or has been borne) by the Board (Tr. 239, 241 Trial Ct. Op., Tr. 69-70, Ill. Sup. Ct., Tr. 274-275).

Additional groups, even atheists, were to be freely permitted to participate upon the same terms (Tr. 118, 119, 159; Trial Ct. Op., Tr. 65), and all have been fully admitted (Trial Ct. Op., Tr. 65). Lesson materials and curriculum were to be selected by a committee representative of all groups participating and in a manner to avoid any offensive, doctrinal, dogmatic or sectarian teaching (Tr. 102-107, 156, 157, 159, 162; Trial Ct. Op., Tr. 66, Sup. Ct. of Ill., Tr. 269). The teaching was to be of the content of the Bible without interpretation or attempt at influencing belief in the doctrines or creeds of any church (Tr. 105-106, 142, 156, 159-160, 161, 227; Trial Ct. Op., Tr. 66, Sup. Ct. of Ill., Tr. 269).

So popular did this program become that in the year of its operation immediately prior to the trial, 80% of the pupils in the grade school classes participated, 31 different faiths and denominations were represented by participating pupils (Tr. 168, 258-259), and *in the five years of its operation, no resident of the school district other than the*

relator voiced any complaint regarding it (Tr. 107, 130, 160, 225).

The son of relator, James Terry McCollum, at the time of the trial ten years of age, enrolled in the fourth grade at South Side School in the fall of 1943, and along with five others did not participate in the religious education class during the first semester (Tr. 174, 178, 182, 192). During the second semester, however, he did participate, procuring his mother's written permission therefor (Tr. 177, 178, 213, 214, 231). In the fall of 1944 he transferred at his mother's request and enrolled in fifth grade in Dr. Howard School and with one other youngster, Elwin Miller, did not attend the religious education class the first semester (Tr. 132, 174, 209). During the second semester he was alone in not participating therein (Tr. 132, 174).

During all of his school life he was viewed by his teachers and by his mother, appellant, as a maladjusted problem-child who got along poorly with his fellows (Tr. 134-135, 177, 198, 208-209, 210; Trial Ct. Op., Tr. 68). In Dr. Howard School, where he got a fresh start among pupils who were not acquainted with him, he frequently teased and fought with his classmates, often starting the fights himself and spitting in their faces and kicking them (Tr. 136, 176-177, 208).

When the other members of his class were attending the religious education classes he continued his regular studies in the music room under the supervision of his regular teacher and on one occasion was placed at a desk in the hall (Tr. 132, 175, 193, 255), where he was teased by passing children who apparently thought he was being punished (Tr. 175, 193). There is no pretense that they teased him about not attending religious education classes. Upon complaint of his mother, this practice was promptly and permanently discontinued, as was the one of placing him in

the music room, when his mother complained that he was a victim of claustrophobia (Tr. 172, 255, 257). He was thenceforth placed with another division of the fifth grade during these periods of religious education (Tr. 257) and no further complaint was made by his mother. His teacher, Mrs. Taylor, testified that her reason for not sending him to the other division in the first instance was that the boy might disturb the other class by seeking to attract attention to himself (Tr. 257). She did not wish to visit this distracting influence on another teacher (Tr. 255).

He did not complain of any embarrassment or coercion in connection with the religious education courses, nor did he contend that he was questioned, except by one boy, regarding his non-participation therein or teased regarding his religious beliefs or unbelief on any occasion (Tr. 185-186; Trial Ct. Op., Tr. 68). Neither did he attribute his failure to get along with his fellows to the existence of the religious education course (Tr. 185-186).

He testified that he had been teased about being an atheist, a fact he had told his cub scout friends about (184-186), but he was not teased about not taking religious education (Tr. 186).

His teacher and a number of classmates categorically denied that he was ever teased either about his atheism or his failure to participate in religious education classes (Tr. 135, 244, 245, 250, 255, 260-261, 263, 264, 265, 266; Trial Ct. Op., Tr. 68). Likewise fifteen children, some his classmates, some children in other classes in the school system, drawn indiscriminately from those who took the classes and from those who did not, and all of the public school teachers and religious education teachers denied that any embarrassment was felt or observed in either those who participated in the program or those who did not (Tr. 153,

154, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 259, 260, 261, 263, 265, 266; Trial Ct. Op., Tr. 66 & 68).

Both he and his mother are atheists (Tr. 184-185, 208). Her views are expressed in a pamphlet attached to her original complaint (Tr. 17-36). While the son expressed curiosity regarding religion (Tr. 134, 178, 193) his mother testified that she is unwilling to have him participate further in the classes as they conflict with her interpretation of a political doctrine denominated "separation of church and state" which she believes forbids the voluntary Champaign program above described (Tr. 193, 201, 211). She denied any religious scruples against the teaching of religious education and expressed her willingness to see it continued if the Court decided that her constitutional views were incorrect (Tr. 201-202).

The relator has other children, one of whom attends a private school which is opened with recitation of the Lord's Prayer, scripture reading and sacred hymn singing (Tr. 211). She enrolled James Terry in a model demonstration class at the University of Illinois during the summer of 1945 where similar opening exercises were held and in which he participated (Tr. 210; Trial Ct. Op., Tr. 67). She has no scruples or objection to her children taking part in these exercises (Tr. 209-211).

This suit was started by her, following a written demand that the Defendant Board of Education adopt rules and regulations excluding religious education instruction from the school buildings, which demand was signed by herself and certain unidentified persons, not residing in the district, who purport to represent unidentified organizations denominated, "Chicago Action Council" and "Civil Liberties" (Tr. 16-17), admitted, (Tr. 54). None of these unidentified persons appeared as witnesses on the trial of this case.

Because we can not know that the Court will dispose of this case upon jurisdictional grounds, as we believe it should, and because our examination of the briefs in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1 (1947) indicates that they did not fully inform the Court of the history of that portion of the First Amendment upon which the appellant seeks to support her first "error relied upon for reversal", we feel that it is necessary that we present to the Court a carefully detailed and historically accurate statement of the background and environment of the establishment-of-religion clause of the First Amendment as well as its legislative history and the legislative debates attending its passage.

We are the more impelled to do this because of the historical inaccuracies that have surrounded current public discussion, and the fact that the first direct judicial construction of the establishment of religion clause of the First Amendment has been delayed for nearly 160 years following its adoption. Such a responsibility will require space in this brief, which a lesser problem would not warrant, and is a responsibility which the advocate must approach with a lack of bias not ordinarily one of his virtues.

SUMMARY OF ARGUMENT.

I-A.

The Establishment of Religion Clause of the First Amendment does not prevent the free and non-discriminatory Use of Public Property for Religious Education classes.

This case involves an interpretation of the First Amendment, not of Madison's Remonstrance, the Virginia bill for religious freedom, or even of Jefferson's "wall of separation between Church and State."

The history of the establishment of religion clause indicates that the words "an establishment of religion" mean a religion which is preferred by law. The amendments proposed by the ratifying conventions and the various versions of the clause in the First Congress show no hostility toward religion. The intention was to prevent the establishment of a national religion having any sort of preference over any other religion. Legislative changes made were to prevent any claim that the amendment was hostile to religion or that Congress could interfere with existing state-favored religions.

The then existing state constitutions and common usage then and now indicate that "establishment", in its context, refers to a religion or sect favored by law over other religions or sects. The practical construction of the clause by Congress and the executive, and by state constitutions (which never use the "establishment of religion" language standing alone) shows that equal aid to all religion was not prohibited. If use of school property is forbidden, then all tax exemptions of religious institutions are invalid as laws "respecting an establishment of religion." The interpretation of the clause by the text writers and cases, except the dictum in the *Everson* case, 330 U.S. 1, is consistent with our definition of the clause.

The freedom of religion clause deals with individual rights; the establishment of religion clause deals with the relationship between government and religious organizations. Considering the expanded meaning which has been given to freedom of religion, the meaning of the word "religion" has there outstripped the meaning of "religion" when used to refer to a human institution. There is no incongruity about this. Freedom of religion deals with the human mind; establishment of religion deals with the relationship between government, organized religion, and individuals.

The establishment of religion clause only prevents preference for one religion over other religions. A tax may be an unconstitutional preference to one religion, not because it is a tax but because it is a preference.

The impartial use of public property for public worship and for voluntary religious education classes, under the constitution and statutes of Virginia, was approved by Thomas Jefferson. Such approval is very persuasive that, since there is no preference of one religion over another or of all religions over atheists in the actual operation of the voluntary Champaign plan of religious education, the establishment of religion clause is not violated.

I-B.

The "establishment of religion" clause of the First Amendment refers to a Nationwide Religion, and is not binding on the several states, particularly if construed to prevent the Type of Local Educational Activity Involved Here.

The assumption made by Court and counsel in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, that the establishment of religion clause is binding on the states is now challenged. If transformed from its historic meaning of preventing the establishment of a favored

religion and compelling observance of it by law, the constitutional clause is not enforceable on the states.

The Fourteenth Amendment does not impose the establishment of religion clause on the states. The meaning of establishment of religion as used in the First Amendment is "*national* establishment of religion", and, therefore, the right of national citizenship is the right to be free of a national religion. The First Amendment, like the Second relating to the right of the people to bear arms, was a division of power between state and Federal government.

The establishment of religion clause did not codify a nationwide disapproval of established religions. Several states then had state-favored churches.

What the Republican party failed to accomplish as a campaign issue in the Hayes-Tilden presidential campaign of 1876, after the adoption of the Fourteenth Amendment, is now sought to be accomplished by judicial decision. An overwhelming majority of state constitutions prohibit payments for sectarian purposes, and there is no need or justification for transferring the enforcement of such restrictions from the states to the Federal government.

The present case involves primarily questions of educational policy which the State of Illinois handles on the intimate level of local school boards, and under judicial decisions prohibiting all class, color or creedal discriminations, which decisions protect Illinois citizens without the acceptance of jurisdiction by this Court *via* the Fourteenth Amendment Route.

II.

The freedom of religion clause of the First Amendment does not prohibit the use of school buildings for religious education.

The classes are voluntary and no coercion or embarrassment due to the plan (which is not the plan of the school

board but of a voluntary group) is shown, Any embarrassment of appellant's son was not due to the classes. The law does not protect against any social consequences of choosing atheism. No tax burden on appellant was proved, and unmeasured, slight and indirect expense should be disregarded as a trifle.

III.

The use of school buildings for voluntary religious education classes and the handling of parents' request cards by teachers do not deprive the appellant of property without due process of law in violation of the Fourteenth Amendment.

Two courts have found that no forbidden expense is incurred and their finding of facts should be followed by this Court. The non-discriminatory use of public buildings by voluntary religious classes, whose pupils submit to no religious tests to enter, is as much a public purpose as the use of school buildings by the American Legion, art groups, civic bodies and those traditionally admitted thereto. The First Amendment has not absolutely quarantined religion from benefits of government. Persons having no religion have no constitutional right to prohibit exercise of religion by those who have.

IV.

No "censorship" of religion is involved in this case.

The school board does not control the curriculum or the teachers. It reserves the right, not yet exercised, to reject persons as instructors who do not have good character and good grammar. These are reasonable regulations of the use of school property committed to its care and involve no violation of religious freedom.

ARGUMENT.

I-A.

The Establishment of Religion Clause of the First Amendment Does Not Prevent the Free and Non-Discriminatory Use of Public Property for Religious Education Classes.

With respect to the clause of the First Amendment, "Congress shall pass no law respecting an establishment of religion", we contend for reasons already set forth that its meaning is not in issue here because it was not argued to or decided by the Supreme Court of Illinois. Without waiving that contention, our position is, first, that the clause does not prevent the *use of school buildings* for the holding of religious education classes *without preference to any sect* and, second, that if this clause of the First Amendment were to be interpreted so as to proscribe what was approved by both courts below, then such clause as so interpreted is not made applicable to the states by the Fourteenth Amendment.

The Origin and Meaning of The Establishment of Religion Clause of The First Amendment.

In order to determine the true meaning of the clause under discussion, it will be necessary to examine the history of the First Amendment. In doing so, it should be borne in mind that it is the meaning of the First Amendment which is being sought, not the meaning of James Madison's Remonstrance, or the meaning of the Virginia Bill for Establishing Religious Freedom, or the meaning

of Jefferson's phrase "wall of separation between church and state".

While in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, the actual decision of the Court was that the establishment of religion clause of the First Amendment did not prevent a state from paying the bus fares of parochial school students, the Court made in its opinion two related statements regarding the meaning of such clause which previous judicial decisions do not support and which the long history of the First Amendment disproves. These statements are that neither the Federal government nor a state can pass laws which "aid all religions", and that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (330 U.S. 1, 15, 16). Since the decision of the case was bottomed on the right of a state, as a matter of public welfare, to transport pupils to schools even though an incidental benefit was thereby conferred upon schools which teach some religious subjects, what was said regarding the establishment of religion clause proved unnecessary to the decision. Nevertheless, the two statements mentioned above are seized upon by the Appellant in support of this appeal, so that their correctness must be examined.

An examination of historical facts not brought to the attention of this Court in the *Everson* case will, we are confident, show that the establishment of religion clause of the First Amendment does not prevent use of state-owned property by its citizens in a way which may incidentally benefit all religion. We defer detailed comments on the *Everson* opinion until we discuss below the authorities which it cites.

However, references in the several *Everson* opinions to

Jefferson's "wall of separation between church and state" and the references to such doctrine in briefs filed herein as though it were in some undisclosed manner a basis for deciding this case, require a critical examination of this doctrine to determine to what extent, if at all, it either aids in or controls the decision of the present case.

The figure of speech, "wall of separation between Church and state" appeared in Thomas Jefferson's reply dated January 1, 1802* to an address to him from the Danbury Baptist Association. This reply was quoted and approved by this Court in *Reynolds* v. *United States*, 98 U.S. 145, 164 (1879) for the very limited purpose of showing that Federal legislation punishing polygamy in a territory was not a violation of the First Amendment.

Stating that the First Amendment had built a "wall of separation between Church and State", Jefferson obviously was referring only to the protection of religious opinion and rights of conscience from governmental interference, for he prefaced the now well-known figure of speech with the statement of the belief "that the legislative powers of the Government reach actions only, *and not opinions*" and followed the figure of speech by describing the religious clauses of the First Amendment as "this expression of the Supreme will of the Nation *in behalf of the rights of conscience*". (Italics supplied). In the *Reynolds* case the Court quoted Jefferson's reply, not because of its reference to separation of church and state, but as proof that the First Amendment protected religious *opinions* but did not protect immoral *acts* which Congress declared to be unlawful. The *Reynolds* case presented a situation wherein the phrase "separation between church and state" could not furnish a rule of judicial decision, for if the

*Jefferson, *Works* (1861), VIII, p. 113; Jefferson, *Writings* (1904), XVI, pp. 281-282.

phrase had been literally applied it would have prevented governmental interference with the defendant's practice of polygamy which he claimed was an expression of his religious belief.

The phrase "separation of church and state" is simply an attempt at an over-all short description of the general relationship of church and state in America as it actually exists and in all of its phases. The phrase is not the statement of an unfulfilled aspiration for which the nation is to strive. It is not a constitutional provision nor a law governing the relationship between church and state. It simply means that no official union of any church and any American state exists; that the corporate and official character of church and government are distinct, and, that as distinguished from a union of church and state, which exists where there is an established church, "separation of church and state" best describes the general relationship of church and state in America. However, the relationship of church and state, in the nation as a whole, necessarily involves and refers to the sum total of all relationships between them. It refers to all of the constitutions and laws of all of the states, and of the United States, as well as to the court decisions interpreting them, so far as they touch upon religion. It refers to their relationship in the different fields of law such as taxation, regulation by police power, and the formation and control of corporations. It refers to the customs and usages of the people in abjuring or encouraging participation in political action and debate by religious groups. It refers to the extent to which government protects, encourages or benefits religion and the extent to which religion does the same for government. It is no more and no less definitive and exact a phrase than are the equally heart-warming phrases, "the democratic way of life" or

"the American way of life". We are justly proud of all of these, but we do not attempt to decide litigated cases by the mere application of such rhetorical phrases. At best, slogans, rhetorical phrases, and labels are mere refuges from reason and authority*.

While we as a people subscribe to the general theory of separation of church and state, there are a multitude of ways in which religion and government touch, cooperate, depend one upon the other by reason of the intimate relationship between religion and society. This relationship reflects the basic fact that the individual man is at once a citizen and a believer subject both to government and to his conscience.

The decision of this case is obviously not to depend upon the application of such a generalized unincisive slogan as "separation of church and state" but upon the judicial interpretation of the First Amendment by application of recognized and established canons of construction. When this Court has thus interpreted the Amendment and has applied such Amendment to the facts of this case, the decision will become a part of the vast, heterogeneous field referred to by the phrase, "separation of church and state".

Likewise we respectfully suggest that a calm, judicial approach to the problem of ascertaining the meaning of the words of the First Amendment, here involved, will relegate Madison's "A Memorial and Remonstrance" to a position of little relative importance among the data available for construction of these words. A number of

* "The tyranny of labels must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other"—Mr. Justice Cardozo speaking for the Court in *Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937).

patent considerations make this obvious. First, it was a pamphlet—generated in the heat of a legislative battle in Virginia—written five years before the First Amendment was drafted or proposed, and, of course, had no reference to it. Second, the document was directed, not against the equal aid and benefit of government for all religions, but rather was pointed specifically at the explicit establishment of one, namely the Christian. Third, it was written by a man whose views with reference to the meaning of the First Amendment are clearly and unequivocally set forth in the debate in Congress and these need no secondary reference for elucidation.

Any search of the Remonstrance for Madison's attitude toward church and state must be undertaken in the light of the evil against which it was directed. The Assessment Bill was one for the establishment of the Christian religion. This inequality Madison immediately saw, together with all of its implications. If the Christian religion could be established and preferred over all others, any other religion or the sect of any religion could, in its stead, be so established and preferred over all others. Accordingly it was this inequality of treatment of religions that was the very heart and core of Madison's opposition to the Bill.

If there is any validity to the Remonstrance as a means of interpreting the words "establishment of religion", it must be found in an examination of the language employed by Madison in order to understand better the usage and sense in which he employed the word "establishment". Examined for this purpose, it may indeed be valuable. The word "establishment" appears in it, not once, but eight times, and in every of these it is used clearly and explicitly to describe the exclusive monopolistic recognition and preferment by law of one religion over all others.

The search for the true meaning of the initial portion of the First Amendment and the application of it to the facts of this case, must be grounded upon two fundamental principles to which all will give assent:

First, constitutional provisions are either grants of power or restrictions upon power marking the extreme limits within which governmental power may be exercised and courts have nothing whatever to do with the wisdom or lack of wisdom of governmental action within those limits (*Booth* v. *Illinois,* 184 U.S. 425, 431 (1902)).

Second, the meaning to be sought is that expressed by the words used as they were commonly understood at the time they were written and in the light of the expressions of the framers during their legislative debates.* (*Ex Parte Bain,* 121 U.S. 1, 12 (1887); see also Mr. Justice Holmes, *Eisner* v. *Macomber,* 252 U.S. 189 (1920) at p. 220).

With these considerations ever in view let us refer to the background and environment of the language "Congress shall make no law respecting an establishment of religion".

At the time the Constitution was drafted, the possibility of formulating a constitution that would create a sufficiently strong federal government to perform its functions and at the same time meet with the approval of the States and the people, was widely doubted. There was widespread suspicion of governments in general and strong national ones in particular. It was this widespread feel-

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* The debates, of course, can not alter a plain meaning, for as Mr. Justice Frankfurter said (*Adamson* v. *California,* 332 U.S. 46, 64, 67 S. Ct. 1672, 1682, decided June 23, 1947):

> "Remarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech".

ing that led the framers to cast their work in the form of granted powers alone and it was as a corollary to this that the resulting document was completely silent upon the subject of religion except to forbid religious tests for office holders under the Constitution.

Religion was not mentioned, *first,* because it was intended that the Federal Government should have no control over the subject (Elliot's *Debates* (1836), III, 93, 204-205) just as the document made no mention of education or intrastate commerce for the same reason, and, *second,* because the religious beliefs and practices of the people throughout the states, as well as the extent of control exercised over religion by the States, were so diverse that it was wholly impractical to attempt any uniform system of relationship between religion and government. (Chas. Warren, *The Making of the Constitution* (1928), pp. 425-426; Story, *Commentaries on the Constitution,* (5th ed., 1891), I, p. 459, sec. 622; II, p. 633, sec. 1879).

This did not, however, indicate any disinterest in religion or indifference for its welfare, but rather spoke eloquently of the anxiety of the framers to protect it, foster it and pre-eminently, to leave it a local rather than a national matter. Most of the framers were devoutly religious and all professed a religious interest *, consistent with the time which was one of great strength of religious forces with active competition among different religious denominations (Story, *Commentaries,* (5th ed., 1891), II, p. 631, sec. 1877; II, p. 634, sec. 1879). To say that interpretation of the Constitution and its amendment is to be made in the light

*"Every one of its members was a believer in God, and in future reward and punishment, and most of them, including the presiding officer, Washington, were church members"—Edwin C. Goddard, "The Law in Its Relation to Religion", 10 Mich. L. Rev. 161, 166.

of these facts or as it is expressed in the *Trinity Church* case (*Church of the Holy Trinity* v. *United States,* 143 U.S. 457, 465, 470 (1892)) in the light of the fact that "* * * no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people" is therefore not a mere appeal to sentiment or a play upon words, but is a meaningful and fundamental aid to construction.

When the great document was referred to the States for adoption or rejection, heated debates took place in the several State Conventions by which it was considered. These largely centered about the dangers inherent in setting up a government much more powerful than any of the parts and the consequent need strictly to limit its powers over the individual and to guarantee a division of powers between the State and Federal Governments. Consequently, opponents of the Constitution contended for, and its friends promised, amendments to it which would clearly deny Federal power in certain fields thereby guaranteeing to the people certain fundamental rights, commonly referred to as the "Rights of Man", and thereby reserving to the states power over certain other rights, such, for example of the right to maintain the militia. (Jefferson, *Writings* (1904 ed.) XIX, p. 57, letter March 23, 1789 to John Paul Jones.)

The ratifying conventions request amendments.

Amendments to be proposed for consideration by the first Congress were considered by most of the ratifying conventions. Several of these conventions accompanied ratification with a request for specific amendments or with resolutions setting forth declarations of principle which are relevant here. Other amendments were proposed by minorities and were defeated in convention and so were

not transmitted to Congress. These declarations and proposed amendments, so far as they related to religion, were as follows:

Pennsylvania (ratified December 12, 1787): An amendment proposed to the Pennsylvania convention but not adopted (E. F. Humphrey, *Nationalism and Religion in America*, 1924, p. 461):

> The right of conscience should be held inviolable and neither the legislature, executive or judicial powers of the United States shall have the power to alter, abrogate or infringe any part of the constitutions of the several states which provide for the preservation of liberty in matters of religion.

Maryland (ratified April 28, 1788). Amendment proposed to the Maryland Convention but not adopted (Elliot's *Debates* (1836) II, p. 553):

> 12. That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty.

South Carolina (ratified May 23, 1788). Amendment requested (Elliot's *Debates* (1836), I, p. 325):

> That the Third Section of the Sixth Article ought to be amended, by inserting the word "other" between the words "no" and "religious".

New Hampshire (ratified June 21, 1788). Amendment requested (Elliot's *Debates* (1836), I, p. 326):

> Congress shall make no laws touching religion, or to infringe the rights of conscience.

Virginia (ratified June 26, 1888). The ratifying resolution of the Virginia Convention declared, in part, "that, among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified by any authority of the United States" (Elliot's

Debates (1836), I, p. 327). A proposed "declaration or bill of rights" recommended as an amendment to the Constitution was adopted the next day, June 27, 1788, and included (Elliot's *Debates* (1836), III, p. 659):

> 20th. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.

New York (ratified July 26, 1788). The New York Convention proposed amendments but none relating to religion. Its resolution ratifying the Constitution declared (Elliot's *Debates* (1836), I, p. 328):

> That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others.

North Carolina (ratified November 21, 1789, Elliot's *Debates* (1836), I, p. 333). The first convention neither ratified nor rejected the Constitution but on August 1, 1788, shortly before its adjournment, passed a declaration of rights containing a twentieth clause which was identical in form with that proposed by Virginia (Elliot's *Debates* (1836), IV, pp. 244, 251).

Rhode Island (ratified May 29, 1790). It proposed amendments but none on the subject of religion. The resolution of ratification did "declare and make known" certain principles, "declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution". Clause IV of this declaration was, with minor textual variations, the

same as the 20th clause of the Virginia declaration (Elliot's *Debates* (1836), I, p. 334).

In determining the meaning of the words in the First Amendment, "any law respecting an establishment of religion", it is important to observe the text of the above amendments and declarations on the specific subject of an establishment of religion—distinguishing that subject from freedom of conscience and of religious worship.

Virginia did not request the enactment of an amendment having the language of her Bill for Establishing Religious Freedom (12 Hening, Va. Stats., p. 86) but so far as material here proposed only "that no particular religious sect or society ought to be favored or established, by law, in preference to others".

North Carolina requested an amendment in identical language.

Except that it omitted the word "particular", New York's declaration of principles was identical with the above language of Virginia.

Rhode Island, after the First Amendment had already been formulated and submitted to the states, used language identical with the language of Virginia.

The proposal for an amendment rejected by the Maryland convention was "that there be no national religion established by law."

All of the above showed simply a desire that no religious sect or society be favored or established by law in preference to others. No prohibition of equal aid to all religions is suggested by the language.

Only New Hampshire asked for a broader prohibition. At this time, the New Hampshire constitution, adopted in 1784, required its chief executive, and its state senators and representatives to be of the Protestant religion

(Thorpe, *Constitutions* (1909) IV, pp. 2459 *et seq.*) and also expressly authorized New Hampshire towns "to make adequate provision at their own expense for the support and maintenance of public protestant teachers of piety, religion and morality" (Thorpe, *Constitutions* (1909), IV, p. 2454). The New Hampshire ratifying convention asked for this amendment (Elliot's *Debates*, (1836), I, p. 326):

> Congress shall make no laws touching religion, or to infringe the rights of conscience.

The purpose of the New Hampshire amendment was obviously not to guarantee to the individual any greater freedom from taxation for the benefit of religion than the amendments of the other states intended or than New Hampshire provided by its own Constitution; the proposed amendment was no doubt designed to furnish an absolute certainty that Congress would not interfere with the existing establishment in that and other states.

In determining the meaning of the words finally adopted, great reliance may safely be placed on the amendments proposed by the states, because it was to satisfy the demands of the states that the bill-of-rights amendments were proposed by James Madison of Virginia.

Madison's attitude toward a bill of rights.

Emphatically, Madison was not on any crusade of his own. It was not he, but others, who feared the absence of a bill of rights. Madison wrote Thomas Jefferson on October 17, 1788, about the growing demand for a bill of rights, saying in part:

> "My own opinion has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time, I have never thought the omission a material defect, nor been anxious to sup-

> ply it even by subsequent amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and, if properly executed, could not be of disservice". (Madison, *Writings* (1865), I, p. 423.)

In this same letter Madison expressed his fear "that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude", mentioning specifically "the rights of conscience".

That Madison was impelled by a duty owed to his constituents, rather than by any personal anxiety for amendments, may be inferred from his remarks in introducing the subject on June 8, 1789 (Annals of Congress, I, p. 424):

> "This day, Mr. Speaker, is the day assigned for taking into consideration the subject of amendments to the Constitution. As I considered myself bound in honor and in duty to do what I have done on this subject, I shall proceed to bring the amendments before you as soon as possible, and advocate them until they shall be finally adopted or rejected by a Constitutional majority of this House."

During the Congressional debates, some of which are set forth below, Madison made further remarks evidencing a lack of personal concern whether amendments were adopted.

Additional and conclusive evidence that it was the request of the states for amendments which induced Congress to propose amendments at the first session is contained in the preamble to the joint resolution submitting the twelve articles of amendment—the third of which became the First Amendment. This preamble was (1 U.S. Stat. L. 97):

> The conventions of a number of states having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse

> of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution—RESOLVED * * *

For the above reasons, the language of the amendments proposed by the several states, which clearly were directed only against the preferment *by law* of one religion over another, militates against the argument that the First Amendment was designed or intended to prevent the Federal government (and least of all the state governments) from allowing public property to be *used* equally and without discrimination for religious purposes.

Madison's Amendments Regarding Religion.

Madison accepted the responsibility for the preparation and introduction of amendments and for their speedy consideration. On June 8, 1789, with the prefatory remarks already set out, he introduced his draft of amendments (Annals of Congress, I, pp. 433-436) none of which was in a form requested by any of the States, but all of which were designed to include and meet the states' most insistent objections to the original Constitution. He stated (Annals, I, p. 433):

> "The amendments which have occurred to me proper to be recommended by Congress to the State Legislatures, are these:"

Version No. 1: "nor shall any national religion be established".

And the fourth of them so far as the same related to the subject of religion was (Annals, I, p. 434):

> Fourthly, that in Article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: The civil rights of none shall be abridged on account of

> religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed * * *

The Fifth of these read (Annals, I, p. 435):

> That in Article 1st, section 10, between clauses 1 and 2, be inserted this clause, to wit: No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.

The first of these, designated "Fourthly", was an amendment to a section of the original Constitution which was a limitation alone upon Congress. It set forth the Bill of Rights which Madison deemed to be proper to restrict the power of the Federal Government in matters of religion. The second of these, designated "Fifthly", was to be inserted among the provisions already prohibiting States from enacting ex post facto laws, impairing the obligations of contracts, etc., and was a limitation solely upon the States.

On June 8, 1789 (Annals, I, p. 450) this draft was referred to the Committee of the Whole and on July 21st, upon the matter being again brought to the attention of the House by Mr. Madison (Annals, I, p. 660), the amendments were referred to a committee of eleven members, one from each state, Virginia being represented thereon by Mr. Madison.

Version No. 2: "no religion shall be established by law."

On August 15, sitting as a Committee of the Whole, the House began consideration of the fourth proposition of the amendments reported by the Committee of Eleven, which read (Annals, I, p. 729):

> Article 1, Section 9: Between paragraphs two and three insert "no religion shall be established by law, nor shall the equal rights of conscience be infringed".

Debates on Version No. 2.

The Annals of Congress are unusually complete in their report of the debate which ensued thereon and preserve the comments of eight members of the House. So important is the legislative history of the amendment, thus disclosed, that it will be illuminating to set out the entire debate* (Annals, I, pp. 729-731):

"Mr. Sylvester had some doubts of the propriety of the mode of expression used in this paragraph. He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether.

"Mr. Vining suggested the propriety of transposing the two members of the sentence.

"Mr. Gerry said it would read better if it was, that no religious doctrine shall be established by law.

"Mr. Sherman thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments; he would, therefore, move to have it struck out.

"Mr. Carroll.—As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present Constitution, he said he was much in favor of adopting the words. He thought it would tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed. He would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.

"Mr. Madison said, he apprehended the meaning of

*cf. *Carpenter* v. *Pennsylvania*, 17 How. 456, 463, (1854) and see Annotation, "Debates, Etc. As Aids to Construction", 70 A.L.R. 26.

the words to be, *that Congress should not establish a religion, and enforce the legal observation of it by law,* nor compel men to worship God in any manner contrary to their conscience. *Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions,* who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and *establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit* [Italics supplied].

"Mr. Huntington said that he feared, with the gentleman first up on this subject; that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it. The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers or building of places of worship might be construed into a religious establishment.

"By charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it. He hoped, therefore, the amendment would be made in such a way to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronise those who professed no religion at all.

"Mr. Madison thought, if the word 'National' was inserted before religion, it would satisfy the minds

of honorable gentlemen. *He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent.* [Italics supplied.]

[*Version No. 3: "shall make no laws touching religion."*]

"Mr. Livermore was not satisfied with that amendment; but he did not wish them to dwell long on the subject. He thought it would be better if it were altered, and made to read in this manner, that Congress shall make no laws touching religion, or infringing the rights of conscience.

"Mr. Gerry did not like the term national, proposed by the gentleman from Virginia, and he hoped it would not be adopted by the House. It brought to his mind some observations that had taken place in the conventions at the time they were considering the present Constitution. It had been insisted upon by those who were called anti-federalists, that this form of Government consolidated the Union; the honorable gentleman's motion shows that he considers it in the same light. Those who were called anti-federalists at that time, complained that they had injustice done them by the title, because they were in favor of a Federal Government and the others were in favor of a national one; the federalists were for ratifying the Constitution as it stood, and the others not until amendments were made. Their names then ought not to have been distinguished by federalists and anti-federalists, but but rats and anti-rats.

"Mr. Madison withdrew his motion, but observed that the words no national religion shall be established by law, did not imply that the Government was a national one; the question was then taken on Mr. Livermore's motion, and passed in the affirmative, thirty-one for, and twenty against it."

Except for the political inexpediency of using the term "national", the words used in the amendment would have

been Madison's "no *national* religion shall be established by law", in which case surely no one would suggest that the amendment was designed to prohibit anything other than the erection of a national church or religion with consequent preferment over other religions.

In the face of the representations—the most significant of which we have italicized above—on the part of Mr. Madison, it is little short of remarkable that any one can ascribe to Mr. Madison an intention that the First Amendment should be given a different meaning than he himself assigned to it in such debate. Are we to brush aside the indisputable historical fact that when questioned by his legislative colleagues, Madison said he apprehended "the meaning of its words to be: that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience"?

Are we now, 160 years after the amendment was explained by Madison, to examine his writings and speeches outside of the legislative chamber and from them seek to determine what his own personal political philosophy was as to the relationship of Church and State and then, disregarding his words at the time of the framing of the amendment, ascribe to the amendment the meaning thus gleaned?

The plain fact is that whatever Mr. Madison's personal political or philosophical views were about the undesirability of conferring the benefits and aid of government upon religion or religious education, he did not as a legislator attempt to write into the amendment any prohibition against equal government aid to all religions.

If he would have personally liked to, he nevertheless as a legislator did not attempt it, doubtless for the good rea-

son stated by him in discussing another amendment (Annals, I, p. 738):

> "I venture to say, that if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty. Amendments of a doubtful nature will have a tendency to prejudice the whole system".

Version No. 4: "shall make no law establishing religion."

On August 20, 1789, (Annals, I, p. 766) the House resumed consideration of the amendments and on motion of Mr. Ames (Annals, I, p. 766) the fourth amendment, as the religious guarantee was then numbered, was altered so as to read:

> Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.

This was done without recorded discussion or debate and was obviously a mere alteration in form without change in content or meaning from the original form which the amendment took in the report of the committee of eleven. The resulting change from the Livermore amendment restored almost the exact language to which Mr. Madison in the debate set out above ascribed the meaning "that Congress should not establish a religion, and enforce the legal observation of it by law" (Annals, I, p. 730) and which Madison had said could express its meaning even more clearly by the insertion of the word "national" before the word "religion". Mr. Livermore's tentative amendment previously adopted by the Committee of the whole was thus entirely disposed of and so far as relevant to our discussion the committee version was reinstated.

The Annals of Congress do not indicate any change in the House text of August 20, 1789, set forth above but apparently a change in the concluding words ("or to in-

fringe the rights of conscience") which is not material here was authorized when the amendments were adopted in the House on August 24, for the Senate Journal of August 25, shows the then third amendment in the following language:

> Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.*

No record was made of the senate debates discussing this amendment and no light has been thrown thereon by examination of the private papers of the Senators or of current newspapers and magazines. The lack of any such account of debate regarding the third amendment (now the First) is, however, itself significant in its implication that no heated contest developed regarding content and that form was the chief consideration involved in the change made by the Senate. The short period of time that the House proposal was before the Senate leads to the same conclusion. The Amendment was first considered by the Senate on August 25 (Annals, I, p. 71) and the Senate on September 9, (Annals, I, p. 77) amended it to read as follows (Records of U. S. Senate, September 9, 1789, U. S. National Archives):

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*Thorpe, *Constitutional History of the United States* (1901), p. 259; verified from senate document dated August 25, 1789 in the U. S. National Archives. The above House version as received by the Senate is set forth in note 6 to Mr. Justice Reed's opinion in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) at page 124, and appears in the photograph of the seventeen amendments received by the Senate on August 25, 1789, THIRD ANNUAL REPORT, Archivist of the U.S., 1936-1937, p. 64.

[*Version No. 5: "no law establishing articles of faith or a mode of worship".*]

> Congress shall make no law establishing articles of faith or a mode of worship or prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition to the government for a redress of grievances.

This did nothing to the House version but indicate the Senate's desire that the amendment contain nothing antagonistic to religion and to make clear that the amendment meant that Congress should not establish a national religion and enforce observance of it by law. This was simply the Senate's way of expressing the meaning which the House intended, as shown by the debates in the House.

Amending the words "establishing religion" to read "establishing articles of faith or a mode of worship" indicated that the Senate entertained the same fear expressed by Messrs. Sylvester and Huntington in the House debate above, namely, that the House wording "Congress shall make no law establishing religion" might be interpreted as hostile to religion. To eliminate this possible implication of hostility to religion and at the same time preserve the meaning intended by the House, language was adopted very similar to that proposed by Elbridge Gerry of Massachusetts in the House when he had said, as set forth in the debate above, that "It would read better if it was, that no religious doctrine shall be established by law." (Annals, I, p. 730, quoted above, p. 40.)

Final Version: "no law respecting an establishment of religion".

Subsequently a committee of conference was appointed and thereafter within 15 days after the Senate revision, the committee had agreed on the language now found in the First Amendment:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *,

and the House had on September 24, without discussion or debate, approved the conference committee's language (Annals, I, p. 913). The Senate approved this final version on September 25, 1789 (Annals, I, 88). Again it is obvious that it was not considered that the form in which it emerged from the conference committee had materially changed the intrinsic meaning.

So far as relevant here, the House version "Congress shall make no law establishing religion", and the Senate version "Congress shall make no law establishing articles of faith or a mode of worship" had been changed to read:

> Congress shall make no law respecting an establishment of religion.

The word "establishing" thus became "establishment". The easiest road to compromise of the divergent language of the House and Senate versions had been the one of minimal change—the word "establishing" which was subject to the possibility of too drastic a meaning gave way to the noun "establishment", and the word "religion" could then safely be restored. The phrase chosen—"establishment of religion"—everyone understood, from the constitutional lawyer to the man on the street, as meaning a state or national church or religion resulting from the preferment by law of one sect or religion above all others.

Undoubtedly the shift from "Congress shall make no law establishing religion" in the House version to "Congress shall make no law respecting an establishment of religion" was intended, by the use of the specialized word "establishment", to make it clear that it was "an *establishment* of religion"—not *religion* itself—respecting which Congress was expressly prohibited from legislating. The use of the language finally adopted makes inadmissible any interpretation which disregards the words "establishment of" and which treats the amendment as though it read "Congress shall make no law respecting religion". (See *Knowlton* v. *Moore*, 178 U.S. 41 (1900) where the Court, p. 87, refers to "the elementary canon which requires that effect be given to each word of the Constitution".)

Having changed the word "establishing" to the noun "establishment", a simple grammatical problem remained to be solved. Some word was necessary to connect the phrase ending with "law" to the remainder, "establishment of religion". The preposition "respecting" lay readily at hand. It was already in numerous laws of the states and was common in legal usage and statutory phraseology. It was accordingly inserted, apparently both to solve the grammatical problem and to make it clear that the Federal government should neither *establish* a national religion nor *disestablish* state religions then in existence. There thus emerged a compromise in language which preserved intact the meaning which Madison—as a legislator interpreting the purpose of the states in submitting their amendments—had so clearly ascribed to the House version in debate on the floor of Congress and the meaning which the Senate had so clearly expressed in its own version. At the same time there was eliminated all implication of hostility toward religion to which the words of the House, "Congress shall make no law establishing religion" were subject.

The resulting amendment doubtless did not fully express Madison's philosophy regarding state aid to religion but as a practical statesman faced with compromising between what he personally wanted and what others wanted, he took what the political climate would permit.*

Madison could not have been oblivious to the fact that public opinion would have been shocked at the thought that equal, non-preferential aid and benefits of government

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*Explaining his attitude toward the controversy regarding a Bill of Rights being added to the Constitution, Madison had said in a letter to Jefferson dated October 17, 1788 (Madison, *Writings*, I, pp. 423-425):

> "I have not viewed it in an important light—1. Because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted. 2. *Because there is some great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition, would be narrowed much more than they are likely ever to be by an assumed power.* One of the objections in New England was, that the Constitution, by prohibiting religious tests, opened a door for Jews, Turks, and infidels. 3. Because the limited powers of the federal Government, and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments and exists in no other. 4. Because experience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State." (Italics supplied).

Similarly, Madison recognized in Congress, upon the occasion of his introduction of his amendments, that the amendments were not necessarily what he himself most desired but were what could "meet the concurrence required by the Constitution." (Annals of Congress, I, p. 433.)

should not be extended to religion (Story, *Commentaries on the Constitution,* (5th ed. 1891), II, sec. 1874).

Virginia Finds the First Amendment Wanting.

Any argument that the establishment of religion clause of the First Amendment incorporated a prohibition against all financial aid to religion, claimed to be inherent in the Virginia Bill for Establishing Religious Freedom, is inconsistent with the sharp and immediate opposition to the First Amendment in the Virginia Assembly, particularly the Virginia senate. It is indeed strange, if the First Amendment (then the Third Article of Amendment) did incorporate all of Virginia's ideas in favor of religious freedom and against any financial support of religious worship, that the amendment there met opposition so effective as to postpone entirely its ratification until December 30, 1791 (Annals of Congress, III, p. 54) by which time the first Ten Amendments had been ratified by sufficient of the other states to make them binding on Virginia. We believe that this Court's attention has not previously been called to the important and indisputable evidence of the unfriendly reception accorded the Amendment by the Virginia Assembly.

On September 28, 1789, three days after concurrence by the Federal Senate and House on the twelve proposed amendments, Richard Henry Lee and William Grayson, United States senators from Virginia, wrote the Governor of that state transmitting the twelve amendments, and saying in part that "it is with grief that we now send forward propositions inadequate to the purpose of real substantial amendments, and so far short of the wishes of our Country [state]". (From *The Daily Advertiser,* New York, N.Y., Jan. 2, 1790).

On the same day, the same Virginia senators wrote a

letter to the speaker of the Virginia House of Representatives, "enclosing the proposition of Amendments to the Constitution of the United States that has been finally agreed upon by Congress" and continuing in part (*The Daily Advertiser,* New York, N.Y., Jan. 2, 1790):

> "We can assure you Sir, that nothing on our part has been omitted to procure the success of those radical amendments proposed by the Convention, and approved by the Legislature of our Country [state], which as our constituent, we shall always deem it our duty with respect and reverence to obey. The Journal of the Senate herewith transmitted, will at once show how exact and unfortunate we have been in this business". [Punctuation as in *The Daily Advertiser.*]

That the United States Senators from Virginia were expressing a dissatisfaction with the amendments which was current in Virginia seems clear, for the state senate postponed approval of the third article [First Amendment] and prevented its early ratification (Madison, *Writings* (1865), I, p. 501).

The Virginia Senate's Objections to the First Amendment.

On December 12, 1789, eight members of the Virginia senate, who were in the majority which had postponed until the next session of the Assembly the third, eighth, eleventh, and twelfth articles of amendment recommended by Congress, entered on the journals "the considerations which have influenced our decision on this subject and our principal objections to these articles." (Journal of Virginia Senate, 1789 (Thos. White, Richmond, 1828), pp. 61-64, also in *The Daily Advertiser,* New York, N. Y., Jan. 26, 1790, reprinting Journal of the Senate, Dec. 12, 1789 from *The Virginia Independence Chronicle*).

In part they stated:

> The Senate of Virginia, having determined to postpone until the next session of Assembly, the third,

eighth, eleventh and twelfth articles to the constitution of the United States recommended by Congress: We the under-written members of the majority on that question, deem it incumbent on us not only from the respect we owe to our constituents and our responsibility to them, but in order to prevent doubt or misrepresentation, to enter on the journals of the house the considerations which have influenced our decision on this subject and our principal objections to those articles.

We are satisfied that the people of Virginia would never have ratified the constitution of the United States, but from a confident hope and firm persuasion of speedily seeing it much more materially altered and amended than it would be by ratifying the propositions lately submitted by Congress to state legislatures. That although we consider some of the amendments offered, as similar, and others merely equivalent to a part of the amendments proposed by Virginia and other states, yet some of them which may seem analogous to other amendments so proposed, are not substantially the same, and fall far short of affording the same security to personal rights, or of so effectually guarding against the apprehended mischief of the government. Of this description we consider the third, eighth, eleventh and twelfth articles.

We conceive that the third article which seems given in lieu of the fifteenth, sixteenth, nineteenth and twentieth articles of the Bill of Rights proposed by the Virginia convention, will not bear a comparison with those articles.

The fifteenth expressly declares the right of the people to assemble together to consult for the common good, to instruct their representatives and to petition for redress of grievances. The sixteenth asserts the right of the people to freedom of speech and of writing and publishing their sentiments and secures the liberty of the press. The nineteenth and twentieth, hold sacred the right of conscience, secures to every religious sect or society, the most perfect equality and effectually guards against any religious establishments.

The third amendment recommended by Congress

does not prohibit the rights of conscience from being violated or infringed; *and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the general government, as to give it a decided advantage over the others, and in the process of time render it powerful and dangerous as if it was established as the national religion of the country.* (Italics supplied).

* * * * *

This amendment then, when considered as it relates of any of the rights it is pretended to secure, will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the amendment proposed by Virginia, and other states for the protection of these rights. We conceive that this amendment is dangerous and fallacious, as it tends to lull the apprehensions of the people on these important points; without affording them security, and mischievous because by setting bounds to Congress it will be considered as the only restriction on their power over these rights, and thus certain powers in the Government which it has been denied to possess, will be recognized without being properly guarded against abuse.

* * * * *

We consider that of the many and important amendments recommended by the conventions of Virginia and other states, these propositions contain all that Congress are disposed to grant, that all the rest are by them deemed improper, and that they are offered in full satisfaction of the whole, and although the ratification of a part of the amendments that have been prayed for by Virginia, would not absolutely preclude us from urging others, yet we conceive that by the acceptance of particular articles we are concluded as to the points they relate to. Considering therefore that, they are far short of what the people of Virginia wish and have asked, and deeming them by no means sufficient to secure the rights of the people or to render the Government safe and dis-

tinguishable we think our countrymen ought not to be put with amendments so inadequate.

That being satisfied of the dangerous effects and tendency of these four articles of the proposed amendments, we are constrained to withhold our assent to them but unwilling for the present to determine on their rejection; we think it our duty to postpone them until the next session of assembly in order that the people of Virginia may have an opportunity to consider of them and know the sentiments of their constituents on the subject.

The above document is highly significant because it so well demonstrates that Virginians, who, after all, were the ones most familiar with the Virginia concept of religious freedom, did not interpret the First Amendment as living up to the spirit or the letter of the Virginia Bill for Establishing Religious Freedom. Since there is no evidence that the Memorial and Remonstrance or the Virginia Bill did enter into the Congressional deliberations on the First Amendment, but there is every evidence that the amendments proposed by the several states were considered, it is only natural that the amendment which was proposed for ratification reflected the attitude of all of the states—a national attitude, not merely the local attitude of Virginia.

The Common Meaning of "Establishment of Religion".

We now turn to an examination of literary and historical sources contemporaneous with the use of the words "respecting an establishment of religion" in the First Amendment. This seems necessary because the meaning ascribed to the phrase by the appellant and lent support by dicta in the *Everson* case, is altogether broader than is warranted by any recognized canon of construction. That it meant simply "national or state church" to the

framers has been shown by its legislative history and background already set forth. Its meaning in common usage is of even greater significance for it is the common and ordinary meaning of the words employed which is the first great canon of construction. Here too there is a uniform and unbroken stream of illustrations which demonstrate that everyone—voters and framers alike—knew at the time of the adoption of the amendment that the words "establishment of religion" meant a state or national church or religion established by law and receiving preferences from government, not equally enjoyed by others, including most commonly tax support for its clergy and houses of worship.

"Establishment" in existing State Constitutions.

The most obvious source available for examination in searching out the common meaning ascribed to this phrase—establishment of religion—is the state constitutions in force at the time of the framing and adoption of the First Amendment. Seven of them had provisions of great similarity in which the words "establish", "established", or "establishment" were used. In each of these, the words were coupled with other language which clearly indicated that the prohibition was directed solely and wholly at preferential or discriminatory treatment of religion, not at all at equal aid to or benefit of religion generally.*

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*Dates refer to the respective dates of the state constitutions. Source is Thorpe, *American Charters, Constitutions and Organic Laws* (1909):

Delaware (1776)—Art. 29: "There shall be no establishment of any one religious sect in this State in preference to another;" (Thorpe, I, p. 567).

Massachusetts (1780)—Part First, Art. 3: "* * * * and no subordination of any one sect or denomination to

The importance of these constitutional provisions is hardly susceptible of over-emphasis for not only do they verify the understanding of the words common at that time, but along with other American Constitutions they were naturally looked to as precedents for the Federal Bill of Rights and the language of the First Amendment may be safely supposed to have been modeled on them and used in a like sense.

The meaning of "Establishment of Religion" in Everyday Usage.

In 1789, the word "establishment" was pregnant with the controversy that had raged and was still raging with

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another shall ever be established by law." (Thorpe, III, p. 1890)

New Hampshire (1784)—Art. 6: "And every denomination of christians demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law, and no subordination of any one sect or denomination to another, shall ever be established by law." (Thorpe, IV, p. 2454).

New Jersey (1776)—Art. 19: "That there shall be no establishment of any one religious sect in this Province, in preference to another; * * *". (Thorpe, V, p. 2597).

New York (1777)—Article 35 abrogated all laws, common or statutory, which "might be construed to establish or maintain any particular denomination of Christians or their ministers". (Thorpe, V, p. 2636).

North Carolina (1776)—Art. 34: "There shall be no establishment of any one religious church or denomination in this State, in preference to any other; * * *" (Thorpe, V, p. 2793).

South Carolina (1778)—Art. 38: "That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State". (Thorpe, VI, p. 3255).

reference to the disestablishment of the Church of England. Every school boy has learned that the longest word in the English language is "anti-disestablishmentarianism". All of the derivatives and root words of "establish" were in usage in connection with this controversy, including *establish, establishment, establishmentarian* and *establishmentarianism.* Similarly, *disestablish, disestablishment,* and their derivatives were used. All of these words referred to this controversy and particularly the word "establishment" when used in association with "religion" referred to the legal status of an established church in relation to the State.

That there has been no change in meaning or usage which can justify any different definition than the historical one will quickly appear from any authoritative current dictionary or encyclopedia. We will quote but two. Webster's *New International Dictionary,* (2d. ed., Unabr.), gives the following meaning of "establishment":

> "esp: a. the establishing by law of a church or religion".

It is significant also that the current edition of the Encyclopedia Britannica in its article on the word "establishment" (vol. 8, p. 726) states in part as follows:

> "ESTABLISHMENT, a word applied to certain religious bodies in their relation to the State. Perhaps the best definition which can be given and which will cover all cases, is that establishment implies the existence of some definite and distinctive relation between the State and a religious society (or conceivably more than one) other than that which is shared in by other societies of the same general character. It denotes any special connection with the State, or privileges and responsibilities before the law, possessed by one religious society to the exclusion of others; in a word, establishment is of the nature of a monopoly."

That the word "establishment" had the same meaning at the time of the adoption of the Amendment as is set forth above will be made clear by references to dictionaries setting forth the definitions of words of historical significance, at different periods. Thus, Murray, *A New Dictionary of Historical Principles* (1888-1933), vol. 3, defines "establishment" as follows:

> "2. esp. the 'establishing' by law (church, religion, form of worship) (a) in early use the settling or ordering in a particular manner, the regulating and upholding of the constitutions and ordinances of the church recognized by the state (b) in 17-18 c. occasionally the granting of legal status to (other religious bodies than that connected with the state) (c) now usually, the conferring on a particular religious body the position of a State church".

This dictionary in its text gives examples of usage from writings current at different dates, including under the year 1788 the following:

> "Priestly lect. his. V LVII 'there is no place where there are more forms of religion openly professed and without the establishment of any of them, than Pennsylvania'."

Likewise, in the *Century Dictionary and Encyclopedia*, the term, "establishment," is defined as follows:

> "6. The authoritative recognition by a State of a Church, or a branch of a church as the national church; the legal position of such a church in relation to the State, hence, also, the religious body thus recognized by the State, and intended and more or less supported as the State church; especially of the Church of England and the Church of Scotland."

In the same dictionary, "establishmentarian" is defined as follows:

> "2. Upholder of the doctrine of recognition of a church by the State and its maintenance by law",

and "establishmentarianism" is defined as meaning:

> "The doctrine or principle of establishment in religion; support of an established church".

A few references from scattered sources in the literature and newspapers of the time, as well as from the debates in only one of the State Conventions called to ratify the Constitution, the convention of North Carolina, will suffice to show that this particular meaning was universally ascribed to the word.*

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* *The American Museum or Repository of Ancient and Modern Fugitive Pieces, Prose and Poetical,* under the heading "Remarks on the Proposed Amendments to the Federal Constitution", September, 1789, No. 111, Volume VI, Total No. XXXIII; pages 235-236:

"It would be very unjust and pernicious to establish any religious system in the United States; but it is needless to guard against such a visionary evil. * * *

"The convention of South Carolina would amend the 3d sect. of the 6th article by inserting the word 'other' between the words 'no' and 'religious'.

"This section, after requiring of all concerned, an oath or affirmation to support the constitution, adds, 'but no religious test shall ever be required as a qualification to any office or public trust under the United States'. If this amendment points out a mere inaccuracy of style, it is so far proper—an oath or affirmation being a religious test; if it means to guard against religious establishments, it is, by what has been said, superfluous."

The Federal Gazette, June 18, 1789:

"The next article [First Amendment] establishes religious liberty, and all of those political rights, which by various tricks of state have been wounded through its means, on the firmest grounds. The tender, the almost sacred rights of conscience, say this inestimable article, shall by no means, on no account be abridged or interfered with. No self righteous or powerful church shall set up its impious domination over all of the rest. Every pious man may pay to the Divine Author of his existence

Practical Construction by Congress of Establishment of Religion Clause.

The true meaning of the First Amendment may logically next be sought in an examination of the contemporaneous acts of the Congress which framed it .** Appellant's position that the amendment prohibits any law respecting

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the tribute of thanksgiving and adoration in the manner of his fore-fathers. (S) A Pennsylvanian".

The Independent Gazetter or The Chronicle of Freedom, November 28, 1787:

"I hope and trust that there are few persons at present hardy enough to entertain thoughts of creating any religious establishment for this country; although I have lately read a piece in the newspaper which speaks of religious as well as civil and military offices, as being hereafter to be disposed of by the new government; but if a majority of the continental legislature should at any time think fit to establish a form of religion for the good people of this continent, with all the pains and penalties which in other countries are annexed to the establishment of a national church; what is there in the proposed constitution to prevent their doing so? Nothing for we have no bill of rights. (S) An Old Whig."

Debates in the North Carolina Convention (1788):

Mr. Henry Abbot: "Many wish to know what religion shall be established. I believe a majority of the community are Presbyterians. I am, for my part, against any exclusive establishment; but if there were any, I would prefer the Episcopal" (Elliot's *Debates*, IV, p. 192).

Mr. James Iredell: "They certainly have no authority to interfere in the establishment of any religion whatsoever; and I am astonished that any gentlemen should conceive they have." (Elliot's *Debates*, IV, p. 194).

Mr. Samuel Spencer: "He therefore thought that no one particular religion should be established." (Elliot's *Debates*, IV, p. 200).

** *Ames* v. *Kansas*, 111 U.S. 449, (1884); *Knowlton* v. *Moore*, 178 U.S. 41, 92-93 (1900); *Van Dyke* v. *Gerry*, 244 U.S. 39, 46; *State* v. *Peterson*, 159 Minn. 269, 198 N.W. 1011, 1012.

religion, even though it equally benefits all religion, is inconsistent with the legislative acts of the First Congress which repeatedly recognized and impartially aided and benefited religion.

Thus on the very day (September 24, 1789) that the House accepted the report of the Conference Committee and adopted its resolution recommending the First Amendment and the others to the States, it also adopted a resolution (Annals of Congress, I, pp. 914-915) "That a joint committee of both Houses be directed to wait upon the President of the United States, to request that he would recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity to establish a Constitution of government for their safety and happiness."

Again, on January 7, 1790, the House adopted a resolution (Annals I, p. 932) "that the chaplains, of different denominations, be appointed to Congress for the present session, one of each House, who shall interchange weekly." This was implemented on the following day (January 8, 1790) by the election of the Rev. William Linn to the office (Annals, I, p. 1043). This practice of electing a Chaplain as an officer of each House and paying him a salary from the national treasury was continued in the Second Congress and without deviation to the present time. During all of this period Congress has been regularly convened by prayer and not simply religious education, but religious worship, of an undenominational character, has been regularly paid for at national expense and joined in by the national legislature.

Similar action with reference to religion was taken by the adjournment of the House on April 2, 1790, in observance of Good Friday (Annals II, p. 1519).

On March 3, 1791 the Congress passed an act for the raising of another regiment of troops and provided for the appointment among other officers of a chaplain (1 U. S. Stat. L. 223).

The Second Congress on March 5, 1792 similarly provided for chaplains in the Army (1 U. S. Stat. L. 241) and the Third Congress made similar provision for the Navy on March 27, 1794 (1 U. S. Stat. L. 350). Again this recognition and benefit of religion has been regularly extended and multiplied by every Congress; not excepting the one now sitting.

This contemporaneous interpretation by the Congress attributed no meaning of quarantine to the "establishment of religion" clause but treated it only as equalizing all religions before the law.

Practical Construction by the Executive.

In the executive department of government a similar treatment was accorded religion. President Washington inaugurated the practice of proclaiming days of prayer and thanksgiving and with the exception of Thomas Jefferson, no President has omitted this recognition of religion.

These practices have not been followed in disregard of the Constitution or out of any unawareness of its provisions, but on the contrary have been adopted as a settled part of our processes of government in the face of determined opposition by Deists and atheists. Their objections have been repeatedly considered and overruled upon thoughtful consideration of the First Amendment. As one of these objectors, Jefferson as President refused to proclaim national days of prayer because he supposed such action prohibited by the Constitution, as an enforced observance of creed, but every President since elected has given a contrary interpretation. Even this, however, says

nothing of Jefferson's attitude toward impartial government aid of religion, but was only another example of his frequently emphasized insistence upon complete freedom of the human mind from all tyranny.

That the practices of the Congress which for 160 years have recognized religion are entitled to weight as a practical construction of the Constitution follows from the fact that such practices were early and frequently challenged as violations of the establishment of religion clause of the First Amendment. In the 32nd Congress, a number of petitions were received asking the abolition of the office of chaplain in the army and in the navy, and such petitions were referred to a senate committee. Its report is most illuminating as to the meaning given this Constitutional provision at that time. (*Reports of Committees of the Senate*, 32nd Cong., 2nd Sess., 1852-1853; Senate Report No. 376, January 19, 1853).

An 1853 Senate Report on the Meaning of "Establishment of Religion".

In referring to the Constitutional clause under discussion the report stated, p. 1:

"The clause speaks of an 'establishment of religion.' What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother country, and its meaning is to be ascertained by ascertaining what that establishment was. It was the connexion with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances. These three par-

ticulars constituted that union of church and state of which our ancestors were so justly jealous, and against which they so wisely and carefully provided."

In laying down the tests of a law respecting an establishment of religion, the Committee continued:

"If congress has passed, or should pass, any law which, fairly construed, has in any degree introduced, or should attempt to introduce, in favor of any church, or ecclesiastical association, or system of religious faith, all or any one of these obnoxious particulars—endowment at the public expense, peculiar privileges to its members, or disadvantages or penalties upon those who should reject its doctrines or belong to other communions— such law would be a 'law respecting an establishment of religion,' and, therefore, in violation of the constitution. But no law yet passed by Congress is justly liable to such an objection. Take, as an example, the chaplains to Congress. At every session two chaplains are elected —one by each house— whose duty is to offer prayers daily in the two houses and to conduct religious services weekly in the hall of the House of Representatives. Now, in this, no religion, no form of faith, no denomination of religious professors, is established, in preference to any other, or has any peculiar privileges conferred upon it. The range of selection is absolutely free in each house amongst all existing professions of religious faith."

After holding that appointment of chaplains in the Congress was not "justly obnoxious to the reproach of invading religious liberty in the widest sense of that term", the Committee answered the argument of the petitioners that the army and navy chaplains formed a "national chaplaincy" which like a national church was an establishment of religion, as follows:

"A national church implies a particular church selected

as the church of the nation, endowed with peculiar privileges, or sustained or favored by the public in preference to other churches or religious societies. Of such a church we have no semblance, nor have we any such chaplaincy. We have chaplains in the army and navy, and in Congress; but these are officers chosen with the freest and widest range of selection—the law making no distinction whatever between any of the religions, churches or professions of faith known to the world. Of these none, by law, is excluded; none has any priority of legal right. True, selections, in point of fact, are always made from some one of the denominations into which Christians are distributed; but that is not in consequence of any legal right or privilege, but the voluntary choice of those who have the power of appointment."

At page 4 of the report the Committee said:

> If this had been a violation of the constitution—an establishment of religion—why was not its character seen by the great and good men who were coeval with the government—were in Congress and in the Presidency when this constitutional amendment was adopted? They were wise to discover the true character of the measure; they, if anyone did, understood the true purport of the amendment and were bound, by their duty and their oaths, to resist the introduction or continuance of chaplains, if the views of the petitioners were correct. But they did no such thing; and therefore we have the strongest reason to suppose the notion of the petitioners to be unfounded. Unfounded it no doubt is. Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience.
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> * * *
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> They [framers] intended, by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not in-

> tend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy. Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world and an habitual reliance upon His protection of the righteous cause which they commended to His care.

This is a thoughtful analysis of the meaning and import of the initial prohibition of the first amendment made by a group of United States Senators in the exercise of their constitutional duties. They made this exposition within sixty-four years of the adoption of the amendment and may naturally be assumed to have had a better understanding of its environment and connotation than can anyone living nearly a hundred and sixty years after such adoption.

Additional Practical Executive and Congressional Construction of "Establishment of Religion".

While the circumstance that the Federal Government was one of delegated and restricted powers operated to minimize the instances in which it had occasion to legislate with reference to religion, to the extent that the new government operated in these fields, no disposition was evidenced to avoid equal, impartial aid to religion. Grants of land and public funds were made to denominational colleges, lands were granted to missions established on the public domain, and religious schools were employed until 1899 to give instruction to Indian tribes. The latter prac-

tice is reviewed in some detail in the official report of *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908) to which reference is made later, and see, *Public Funds for Church and Private Schools*, (1937), Richard J. Gabel, pp. 173 *et seq.*

Practical Construction of "Establishment of Religion" by State Constitutions.

A most illuminating example of the unanimity with which the words "establishment of religion" have been given the practical construction for which we contend is found in the use of similar words in state constitutions.

We have already given attention to the wording of these constitutions at the time of the adoption of the First Amendment and have shown how the language used in this amendment grew out of somewhat similar provisions in certain of those state constitutions, which were plainly designed only to prevent the preferment by law of one religion over another. Let us now turn to an examination of present state constitutions to see to what extent the framers of these organic laws saw in the words "no law respecting an establishment of religion", a prohibition against use of public funds for the equal and impartial benefit of religion. Four states, and four only, of the forty-eight, with the Federal Bill of Rights prominently before all of them as a model, have used the words with which we are concerned.

The first ten amendments have been liberally drawn upon and are frequently lifted almost in their entirety—yet only four states have used the "establishment of religion" clause. If, as contended, this clause is a broad, clear expression preventing aid to religion in any form and to any religious institution, what accounts for the paucity of its use? But far more important is the fact that not one of these four states has relied upon this language of

the First Amendment to prevent equal, non-preferential aid to religion. On the contrary, every one of them has incorporated either into the same or a different article of its constitution specific prohibitions of the use of public funds for the support of religion, equally or otherwise.

Are we to suppose that the lawyers of these states, who were so liberally represented in the Constitutional Conventions which drafted these frames of government, were so obtuse that they could not understand what is now said to be so clear? Or is it not more reasonable to suppose that this is but another part of the great and uniform stream of interpretation which has recognized and fixed the meaning of the words "establishment of religion" as a national or state church or religion, preferred over other religions?

A brief reference to the constitutions of the four states mentioned will be sufficient to make the point:

Art. I, Sec. 3, of the Constitution of **Iowa** (1857) is in part as follows:

> "The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

Nevertheless, this same article continues as follows:

> "Nor shall any person be compelled to attend any place of worship, pay tithes, taxes or other rates for building or repairing places of worship, or the maintenance of any minister or ministry."

Art. 4 of the Constitution of **Louisiana** (1921) is in part as follows:

> "Every person has the natural right to worship God, according to the dictates of his own conscience, and no law shall be passed respecting an establishment of religion".

Nevertheless, Article 53 of the same constitution provides:

"No money shall ever be taken from the public treasury, directly or indirectly in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such, and no preferences shall ever be given to, nor any discrimination made against any church, sect or creed of religion * * * ".

Art. 1, Sec. 4 of the Constitution of **South Carolina** (1895) is in part as follows:

"The general assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * * ".

Nevertheless, Art. 11, Sec. 9 of the same constitution provides:

"The property or credit of the State of South Carolina or any county, city, town, township, school district, or other subdivision of the state, or any public money, from whatever source derived shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used directly or indirectly, in aid of or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or is part under the direction or control of any church or of any religion or sectarian denomination, society or organization."

Art. 1, Sec. 4 of the Constitution of **Utah** (1895) is in part as follows:

"The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * * ".

Nevertheless, a further provision of the same article and section, is in part as follows:

" * * * no public money or property shall be appropriated for or applied to any religious worship, exer-

cise or instruction, or for the support of any ecclesiastical establishment."

In the case of each of these states, the framers obviously thought that the language prohibiting an establishment of religion was not sufficient, standing alone, to prevent the expenditure of public funds for the equal aid for religious institutions, including schools. Consequently, when they as sovereign states were stating their own legislative and constitutional policy, with regard to tax support of religious education, they felt a necessity for using different language than is contained in the First Amendment. This is a practical, but deliberate, interpretation of the meaning of the First Amendment.

Tax Exemption as a Practical Construction of "Establishment of Religion".

One other practical construction has been placed upon the words "no law respecting an establishment of religion". This has been accomplished by legislation of every one of the states and by the Congress of the United States, not by single acts, but by a chorus of full harmony from the inception of the Federal Government. Each of these governments, the States usually by constitutional provisions, and all by implementing legislation, have expressly exempted from taxation all religious organizations or, in the alternative, property used for religious purposes. This has been accomplished by varying language and to different extents, but all have liberally and equally and non-discriminatively extended the exemption. * This

* This tax exemption may be granted or withheld by Congress and state legislatures free of Federal constitutional provisions, except where a tax is sought to be imposed upon the direct exercise of a right guaranteed by

has been, of course, a direct and equal aid or benefit to religion amounting to hundreds of millions of dollars annually and is fully consistent with, and illustrative of, the constitutional interpretation for which we contend. It is equally in such sharp and violent conflict with the supposition that the words being examined proscribe any aid to religion—even equal and non-discriminatory—that such tax exemption must either be considered as the greatest anomaly in modern jurisprudence, or it must be given its true significance as an unmistakable evidence of the correctness of our thesis.

Who would have the temerity to suggest, in a case challenging the right of the State of Illinois to grant tax exemptions to religious organizations, that the First Amendment forbade such exemption as an aid to religion?

Use of Public Buildings for Religious Meetings.

A final, persuasive practical interpretation has been given the First Amendment, not by legislative deliberations, but by the customs and usages of the American people as a whole. This has been accomplished by the free and equal use of school buildings, court houses and town

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the Federal constitution. See *Gibbons* v. *District of Columbia*, 116 U.S. 404, 408 (1886) where it is said:

> "In the exercise of this power, Congress, like any state legislature unrestricted by constitutional provision, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property".

That complete tax exemption is not demanded by the First Amendment is implicit in *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943):

> "We do not mean to say that religious groups and the press are free from all financial burdens of government".

halls in most of the states for numerous social, educational, recreational and religious meetings. This practice began in early colonial times and is a feature of American life as widespread now as in the lifetime of Jefferson.**

That this is a significant custom, the appellant prominently admits in the opening portion of her argument, (brief, p. 15). There the Court will find authorities and references to annotations which deal with the use of school buildings by religious groups and show frequent approval of such use.

Illustrative of this is the case of *Nichols* v. *School Directors*, 93 Ill. 61, (1879). There the attack was upon the use of school buildings for holding religious services outside of school hours. Notwithstanding the strict provisions of the Illinois Constitution, Article 2, Section 3, and Article 8, Section 3, prohibiting appropriation or payment of public money in aid of religion, the court upheld the constitutionality of such use, saying (p. 64):

"Religion and religious worship are not so placed

**In a letter of November 2, 1822 to Dr. Thomas Cooper of Philadelphia, who had been offered earlier the first professorship of the University of Virginia (Jefferson, *Writings*, Memorial Assn. Ed., 1904, XIX, pp. 367, 377, 381), Jefferson referred with apparent approval to the custom of using the county courthouse for religious services. He wrote, in part (Jefferson, *Writings* (1904), XV, p. 404; Jefferson, *Works* (1861) VII, p. 266; Jefferson, *Writings* (1905, Ford ed.) XII, p. 270):

> "In our village of Charlottesville, there is a good degree of religion, with a small spice only of fanaticism. We have four sects, but without either church or meeting-house. The court-house is the common temple, one Sunday in the month to each. Here, Episcopalian and Presbyterian, Methodist and Baptist, meet together, join in hymning their Maker, listen with attention and devotion to each others' preachers, and all mix in society with perfect harmony."

under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the State. That instrument itself contains a provision authorizing the legislature to exempt property used for religious purposes from taxation; and thereby, the same as is complained of here, there might be indirectly imposed upon the taxpayer the burden of increased taxation, and in that manner the indirect supporting of places of worship. In the respect of the possibility of enhanced taxation therefrom, this provision of the constitution itself is even more obnoxious to objection than this permission given by the school directors to hold religious meetings in the school house. There is no pretense that it is in any way in interference with the occupation of the building for school purposes."

In only a handful of States has the practice of allowing religious groups the use of public buildings been forbidden and then only because of highly restrictive constitutional prohibitions against use of public funds (and sometimes, also, public property) for sectarian purposes. Never, so far as our research discloses, has it been successfully challenged on the ground that it was a violation of the First Amendment or of any state constitutional provision having only the language of the First Amendment.

It is perhaps true that this practice, which long antedated our written constitutions and has continued for more than a century and a half after their adoption, may be somewhat narrower than our thesis that the establishment of religion clause leaves direct, equal, and non-discriminatory aid to religion unproscribed. But equally true is it that this custom stamps with approval all—and more than all—that is involved in the use of school buildings in the instant case.

Interpretation of the Establishment of Religion Clause by Text Writers and Adjudicated Cases.

In discussing the religious clauses of the First Amendment, Mr. Justice Story writing in 1833 in his *Commentaries on the Constitution of the United States*, made it clear that the First Amendment was not designed to be unfriendly to religion, but rather to preserve an equality between sects, and, most important, to leave the matter of religion entirely to the states. Story stated, in part (5th ed., 1891, v. II, sec. 1873) that "every American colony, from its foundation down to the revolution, with the exception of Rhode Island, if, indeed, that State be an exception, did openly, by the whole course of its laws and institutions, support and sustain in some form the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the States down to the present period [1833] without the slightest suspicion that it was against the principles of public law or republican liberty".

Story then sets out in the same section sufficient of the Massachusetts Bill of Rights to show "its pointed affirmation of the duty of government to support Christianity, and the reasons for it". This Bill of Rights provided in part that "the legislature shall from time to time authorize and require, the several towns, parishes, etc., to make suitable provision at their own expense for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily".

In section 1874, the author continues:

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under con-

sideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

Coming to the "real object of the amendment," Story says (sec. 1877):

> The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.

Nowhere in Story's work is there even an intimation that the purpose or effect of the First Amendment was to prevent the use of public property for the equal benefit of all religions.

Another text writer of highest standing on Constitutional questions is Judge Thomas M. Cooley who in dealing with state constitutions places the following under the heading of "Any law respecting an establishment of religion" (Cooley, *Constitutional Limitations*, p. 469; (4th ed. 1878), p. 584):

> The legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete religious liberty where any one sect is favored by the State

> and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege.

The subsequent paragraphs in which Cooley summarizes the explicit provisions in state constitutions against state aid to sectarian religion and sectarian education are no part of the author's discussion of a law respecting "an establishment of religion", thus plainly indicating his view that such subjects were not includible under a discussion of an establishment of religion.

Edwin S. Corwin in the eighth edition of his work "The Constitution—What It Means Today", published in 1946, states (p. 150):

> "An establishment of religion means a state church, such as for instance existed in Massachusetts for more than forty years after the adoption of the Constitution."

We find no text writer who suggests that the establishment of religion clause of the First Amendment prevents the use of public property for the equal and non-preferential benefit of religious bodies. In considering the meaning of the clause, it is important to keep constantly in mind the fact that state-court cases are usually based upon specific provisions of state constitutions against appropriation of money and, in many cases, use of state property. Hence, the decisions of state courts dealing with their own constitutions are not persuasive of the meaning of the establishment of religion clause of the First Amendment to the Federal constitution. The only cases of value are those interpreting that constitution.

None of the cases in this Court, prior to *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, (1947), called for any definition of the establishment of religion clause of the First Amendment. However, the mere references to this clause that do appear in the reports of this Court prior to the *Everson* case are entirely consistent with and tend to sustain the meaning for which we contend. Thus, *Davis* v. *Beason*, 133 U.S. 333, (1890) a criminal prosecution sought to be defended on the ground that polygamy was a matter of religious belief which was protected by the First Amendment, contains language by Mr. Justice Field, which really defines the establishment of religion clause of the First Amendment as follows (p. 345):

> "It is assumed by counsel of the petitioner, that because *no mode of worship can be established* or *religious tenets enforced* in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated." (Italics supplied).

The italicized words, which obviously refer to the establishment of religion clause, succinctly describe what is meant by that clause—no mode of worship can be established and its observance enforced by law. This is strikingly similar to the explanation given by James Madison in the Congressional Debates already quoted above, p. 41.

In *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), this Court refused to enjoin payment of public moneys to a hospital in the District of Columbia which was under Roman Catholic sponsorship. The case came up on the allegations of

the complainant's bill for an injunction. The plaintiff based his claim upon the contention that Congress had no power to make "a law *respecting a religious establishment*" which led Mr. Justice Peckham, writing the opinion for a unanimous Court, to state (p. 297) that this was "a phrase which is not synonymous with that used in the Constitution which prohibits the passage of a law *'respecting an establishment of religion'*".

In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), the first case expressly stating that the Fourteenth Amendment imposes on the states observance of the religious clauses of the First Amendment, this Court, by Mr. Justice Roberts, interprets the words, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof", as follows (p. 303):

> "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the amendment embraces two concepts,—freedom to believe and freedom to act."

This quotation clearly indicates that the establishment of religion provision "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship" and does not imply that it contained any broader prohibition. The language used in this opinion of the Court is almost identical with the wording adopted by the United States Senate on September 9, 1789 (p. 46, above) to express the Senate's meaning of an establishment of religion: "Congress shall make no law establishing articles of faith or a mode of worship" etc.

Certain other cases are referred to in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, 15, Note 21, but those cases do not in anywise define the establishment of religion clause of the First Amendment. For example, *Terrett* v. *Taylor*, 9 Cranch (U.S.) 43, involved the validity of Virginia statutes seeking to subject to sale by the overseer of the poor the lands formerly belonging to the Anglican Church. The First Amendment to the Federal Constitution was not involved. In discussing the laws of Virginia, Mr. Justice Story said (p. 49):

> "Consistently with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline or to pay taxes to those whose creed they could not conscientiously believe. *But the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties*, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead." (Italics supplied.)

Reynolds v. *United States* 98 U.S. 145, (1879), is discussed above (p. 26) sufficiently to show that the matter then before the Court, a prosecution for polygamy, did not in anywise involve the "establishment of religion" clause of the First Amendment. The discussion of the meaning of the First Amendment which appears in that case answered the defendant's argument that he could not be punished for polygamy because polygamy was an exercise of his constitutional right to freedom of religion. The case did not involve in anywise the possible financial relationships between Government and religious education.

Watson v. *Jones*, 13 Wall. (U.S.) 679 (1872), did not involve the meaning of the establishment of religion clause,

and the Court did not undertake to define it. What was there involved was the question of the jurisdiction of a court of equity to adjudicate a property dispute between factions of a Presbyterian congregation which had divided on the slavery issue. The quotation from a South Carolina case, *Harmon* v. *Dreher*, 1 Speer's Eq. 17, 120 (1843), which is referred to in the *Everson* case is as follows:

> "The structure of our Government has, for the preservation of civil liberty, rescued the temporal from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority."

That this highly generalized statement has nothing to do with the specific question now before this Court is clear from the fact that the *Harmon* case, from which the quotation was taken, was a suit by a minister claiming certain rights in the use of church property notwithstanding his expulsion as one of the members of the synod. The subject under discussion in the *Harmon* case was what effect should be given by the Court to the action of the ecclesiastical authority in expelling the minister. It gave full effect to such action.

At page 728 of the opinion, the Court also said:

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

This statement was simply a declaration that our law favors no one sect or religion over another. It is not a statement that government is forbidden impartially to aid all religion.

Quick Bear v. *Leupp*, 210 U.S. 50 (1908), was a suit to enjoin payment of monies to a Catholic mission school, appropriated by Congress from Indian trust and treaty funds for the education of Indians of the Sioux tribe. The *Quick Bear* case is entitled to more than passing notice because of what we consider to be an erroneous

statement of its holding in a footnote of one of the dissenting opinions in the *Everson* case, 330 U. S. 1, 43, Note 35. A reading of the *Quick Bear* case does not substantiate either of the two statements made in such note, (1) that the constitutional question "was squarely raised", and (2) that "it was stated also that such a use of public monies would violate both the First Amendment and the specific statutory declaration involved, namely, that 'it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school' ". On the contrary, from this Court's statement in *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908), it is clear that for eighty years—commencing in 1819 (p. 58) and ending in 1899 (p. 61)—the Congress had appropriated public moneys (not limited to trust or treaty funds) for the education of Indians in schools conducted by religious societies and that in the *Quick Bear* case the Attorney General argued (210 U.S. 50, 73-74):

> "'There is no constitutional question. For eighty years Congress extended aid out of the public funds to mission schools of various denominations, finally withdrawing it because of opposition among the people at large and because the time had thus arrived for establishing distinctive government schools. If there were a valid constitutional objection to the earlier course, it is probable that it would have been discovered during that period of eighty years. The Constitution provides that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.' A religious establishment, however, is not synonymous with an establishment of religion. See *Bradfield* v. *Roberts*, 175 U.S. 291, upholding an appropriation for a Roman Catholic hospital."

In response to this argument, and apparently approving it, this Court, by Mr. Chief Justice Fuller, stated (p. 81-82):

> "Some reference is made to the Constitution, in respect to this contract with the Bureau of Catholic

Indian Missions. *It is not contended that it is unconstitutional, and it could not be. Roberts* v. *Bradfield*, 12 App. D.C. 475; *Bradfield* v. *Roberts*, 175 U.S. 291.

"But it is contended that the spirit of the Constitution requires that the declaration of policy that the government 'shall make no appropriation whatever for education in any sectarian schools' should be treated as applicable, on the ground that the actions of the United States were to always be undenominational, and that, therefore, the government can never act in a sectarian capacity, either in the use of its own funds or in that of the funds of others, in respect of which it is a trustee; hence, that even the Sioux trust fund cannot be applied for education in Catholic schools, even though the owners of the fund so desire it. But we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof." (Italics supplied.)

The specific holding of this Court was that payments of Indian *trust funds* and *treaty funds* to the Bureau of Catholic Indian Missions for education of Sioux Indians was not prohibited by a *statute* which, the Court held, applied only to public funds. However, the history given, the argument of the Attorney General, and the language of the Court in response to such argument show a practical construction of the Constitutional provision which is in our favor.

What a "law respecting an establishment of religion" means.

The word "establishment", in the First Amendment was deliberately used in the final compromise between the House and Senate versions of the First Amendment and cannot be disregarded. The phrase cannot be read as though it

prohibited every "law respecting religion". "Respecting", as used in the amendment, of course means "relating to" or "concerning" in the broad sense. As elaborately pointed out above, "establishment of religion" means "a religion or religions preferred by law over all other religions."

To disregard "establishment of" is to violate the fundamental canon of construction already mentioned that every word must be given meaning and no word is to be disregarded as meaningless. Furthermore, the House of the First Congress rejected Livermore's version forbidding the making of any law "touching religion" (pages 42, 44, above), so there is added reason for refusing to disregard the words "establishment of".

We further submit that the First Amendment does not use the word "establishment" as synonymous with "promotion" or "assistance" but is limited by every historical consideration and the plain meaning of the phrase "establishment of religion" to the preferment by law of one religion over another. If "establishment" be treated as synonymous with "assistance" or "promotion" or the words "establishment of" be entirely disregarded, the clause is given the very meaning of hostility to religion which the debates and congressional history of the amendment indicate was intended to be avoided by changing the House version of the amendment "Congress shall make no law establishing religion" to the final form, "Congress shall make no law respecting an establishment of religion".

Similarly, if the true historical meaning be preserved, the word establishment does not refer to a religious institution so as to prohibit all laws respecting religious institutions. "Establishment" was not used in that sense, and as Mr. Justice Peckham pointed out in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), the constitutional phrase "an establishment of religion" is not an equivalent to "a religious

establishment" if the latter be used to mean a "religious institution" in the same sense that a school, church building, or even an incorporated body not having a preference of the kind inherent in the meaning of the word "establishment", is an "institution" or "establishment". The historical meaning of the word "establishment" precludes its having been used in the First Amendment in the sense of an "undertaking establishment", or a "dry-goods establishment", or a "liquor establishment".

As to the meaning of the word "religion", it is correct that the one word "religion" is common to both the establishment of religion and the freedom of religion clauses, but the meeting ground is a grammatical one. Modifying words which are not common to both clauses and the context and purpose of each clause tend to give the word "religion" a broader meaning as part of the freedom clause than the historic meaning of the word "establishment" permits the word "religion" to receive when used as a grammatical portion of the words "an establishment of religion." To give a homely, extreme (and, therefore, perhaps poor) illustration of our point, if one refers to "black and white horses", the word "horse" is common to both, but the modifying words make them "horses of a different color".

The same reasons for giving an expanded meaning to the word "religion" as it pertains to freedom of opinion and thought do not obtain when "religion" is considered as a part of the clause, "establishment of religion".

To be specific: An expanded meaning of the word "religion" in the freedom of religion clause will protect freedom for all shades of thought. That does not require that the word "religion" be given the same meaning when treated as part of the clause "establishment of religion". The freedom clause deals with the human mind, the depths

of which cannot be plumbed; the establishment of religion clause deals with a human institution, "an established religion", which historically—and today—is a much more definite concept than the concept of the religion of an individual. There is nothing incongruous in treating them decisionally on a different basis—certainly not more incongruous than holding that the words "United States" are used in different meanings in the Federal Constitution.*

The freedom of religion clause governs and protects an individual against the state in the exercise of his religious liberty, while the "establishment of religion" clause deals directly with the relationship of government to an organized religion and only indirectly with the individual, thereby making it a three-way matter: government, church and individual.

[Except for its helpfulness, if any, in analyzing the two religious clauses of the First Amendment, the above distinction is of no importance on the facts of the present case. There is presented here no discrimination between religion on the one hand and atheism on the other. The appellee, Board of Education, concedes that both are entitled to receive equal treatment in the operation of the plan of religious education, and that both are entitled, on the same terms, to the permission of the Board of Education to use schoolrooms and to release pupils from their public school class—the sole participation of the Board in the plan.]

The above meaning of "respecting an establishment of religion" is, we submit, the only one which the plain meaning of the words used and the history of the enactment of the First Amendment can sustain.

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* *Downes* v. *Bidwell*, 182 U.S. 244, 262-263; *Loughborough* v. *Blake*, 5 Wheat. (18 U.S.) 317, 319.

The School Board Has Not Violated the Establishment of Religion Clause of the First Amendment.

Applying such a test to the present case, and assuming for this argument that the clause is made applicable to the states by some portion of the Fourteenth Amendment, the action taken by the defendant Board of Education is clearly not within the proscription of the First Amendment.

No preference between religions or between sects has been pointed out, and the undisputed testimony is that the same plan is open to all (Tr. 118-119). This includes unbelievers (Tr. 119). While the superintendent of schools indicated that it would be hard to deal separately with individual groups (Tr. 127), he also testified that the class room is available to Jehovah's Witnesses (described in his testimony as "people who teach religion to the effect that saluting the flag is wrong") but added "they have never asked for it" (Tr. 118). The president of the school board testified that "the religious people" who had asked for the approval of the plan "were all to be treated alike" (Tr. 127). There has been no complaint that they were not (Tr. 159). The trial court made all of above findings (Tr. 65).

The distinction must be made again here between the actions of the voluntary Council of Religious Education and the school board. Unless and until some atheist has asked and been refused permission to use a school room to instruct children whose parents request their children to be instructed in atheism, no constitutional right of any atheist is infringed. The fact that an atheist might not be welcomed into the religious education council shows no denial of his rights, for the school board does not require that an atheist or any group be a part of the council before being recognized by the school board. What is open to attack here is

not what somebody guesses may happen, but what actually has happened. To complain of an unconstitutional law, one must be the victim of it.

Lehon v. *City of Atlanta*, 242 U.S. 53, 56 (1916).

There may be an argument made in this case that because there are a large number of varying religious opinions, no system of released school time which requires the use of school rooms can be non-preferential, because, it may be argued, there will not be enough separate rooms for each group. A complete answer to that argument is that it presupposes a situation which has not occurred in Champaign and of which there is no reasonable certainty that it will occur. As far as constitutional rights are concern d, there will be time enough to decide them when the situation presupposed shall have actually occurred—when some religious sect or atheistic group has been denied the use of facilities on the same basis as existing groups are permitted to use them. So long as facilities are available for the non-preferential operation of the plan no constitutional question is raised by the mere conjecture that so many sects may wish to have separate classes that the continuance of the plan is endangered. There will be time enough to cross that bridge when we come to it. This problem is no different than the similar one of accommodating all individuals or groups who may desire to exercise the rights of free spe h or assembly in parks or streets.

There is a further intimation that because small classes will be sent to small rooms and large classes will use large rooms, the operation of the plan is preferential. We deem such an argument too unsubstantial on any theory of constitutional law to justify an answer. It will be obvious that small rooms best accommodate small groups and large ones best accommodate large groups.

It is argued that even though aid to religious groups incurs no expense, the school board may not permit such aid because government must be "neutral" between religion and other beliefs. So long as the school board offers to treat irreligious groups on the same basis as the religious groups, no lack of neutrality is shown.

The theory that government may not aid all religion for fear of appearing unneutral as between religion and irreligion is a misapplication of the establishment of religion clause. An essential difference between the freedom of religion clause and the establishment of religion clause ought to be noticed in determining the operation of each.

In dealing with religious liberty, this Court has said, by Mr. Justice Douglas in *United States* v. *Ballard*, 322 U.S. 78, 86 (1944):

> "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *West Virginia State Bd. of Edu.* v. *Barnette*, 319 U.S. 624. It embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths".

It follows from this that whether thoughts be classified as religious, unreligious, irreligious, or in any other way, the resulting right of belief, of opinion, and of thought is always an absolute right. That, however, does not necessarily make it a "religion" under the "establishment of religion" clause.

The freedom of religion clause deals with the individual. The establishment of religion clause, although doubtless enacted through a desire to forestall religious persecution of the individual, does not operate directly upon the individual, but seeks to protect his rights through controlling the relationship between organized religion and government. (Story, *Commentaries*, 5th ed., 1891, sec. 1877.)

While the end sought is similar, the method of achieving the end is different. In dealing with the establishment of religion clause, we are dealing with religious groups, and there the law is satisfied by equality between religions. (Story, *Commentaries*, 5th ed., 1891, sec. 1877). While the establishment of religion clause required the government to be neutral between sects, it did not require it to be unfriendly to all religion (Story, *Commentaries*, 5th ed., 1891, sec. 1874).

James Madison made a clear distinction between rights of conscience, (freedom to believe), and the relationship between government and religion. It will be recalled that the proposed constitutional amendments which he introduced into the First Congress included a fifth proposition (p. 39, above) that "No state shall violate the equal rights of conscience * * * ". This fifth proposition was a limitation solely upon the States and contained rights which he said he considered so fundamental as to require a "double security" against the acts of any government, either State or Federal (Annals of Congress, I, p. 441).

This proposal of Madison's is important in drawing the distinction between the fundamental freedoms which required a guarantee against all governmental action, State and Federal, and those requiring only guarantee against Federal action. It is immediately apparent, since he did not seek to prevent the states from establishing a religion or to require them to disestablish existing state-favored religions, that he did not consider the prevention of an established religion to be as fundamental as the rights of conscience.

The fact that the establishment of religion clause and the freedom of religion clause are both in the First Amendment, does not require that they be given the same application. *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 427 (1934).

To treat the establishment of religion clause as something erecting a quarantine between all religion and government in the same way that the individual's freedom of thought is protected against all government action under the freedom of religion clause disregards the undoubted fact, which has been repeatedly determined by judicial decision, that this is a religious nation. The religious liberty of an individual is protected against the possible tyranny of a state church by equal and non-preferential treatment of all religions, without restraining the government from recognizing all religions impartially:

Holy Trinity Church v. *United States*, 143 U.S. 457 (1892).

Wilkerson v. *City of Rome*, 152 Ga. 762, 110 S.E. 895, 20 A.L.R. 1334 (1922).

Gordon v. *Bd. of Edu. of Los Angeles*, 78 Cal. App. 2d 498, 178 P. 2d 488 (1947).

People ex rel. Latimer v. *Board of Education of City of Chicago*, 394 Ill. 228; 68 N.E. 2d. 305 (1946).

Reichwald v. *Catholic Bishop of Chicago*, 258 Ill. 44; 101 N.E. 266 (1913).

In the last case, the court said (p. 48):

> "The man of no religion has a right to act in accordance with his lack of religion but no right to insist that others shall have no religion".

When acting under the "freedom of religion" clause, there can, of course, be no attempt to determine even the nature of the individual's belief. The Constitution, having been drafted by men friendly to religion, did not, however, require the government to go further under the "establishment of religion" clause than to require equal treatment in law *of all religions*.

Applying the establishment of religion clause of the First Amendment as interpreted above, it is clear that

the action of the Board of Education of the Champaign school district in permitting a use of school premises for religious instruction upon the responsibility and at the expense of the Champaign Council of Religious Education has not in anywise violated the appellant's constitutional rights under said clause. Under the authorities, a law is not one respecting an establishment of religion unless it favors or tends to favor one sect or one religion over another. Even treating atheism, for the purposes of this case, as a religion within the meaning of the First Amendment—an assumption which would have horrified the Framers—, there still is no unconstitutional discrimination against the appellant because she has never demanded and the Board of Education has never refused to give equal rights to atheists to hold classes in the school buildings similar to those held by the religious groups.

It is further argued that the alleged expenditure of public funds for the religious education classes is a benefit to religion prohibited by the establishment of religion clause.

In essence, the question before the Court is whether the establishment of religion clause just as broadly prohibits appropriation of monies for a sectarian purpose as do the elaborate and specific constitutional provisions of the states against such appropriations. At no time prior to the decision of the *Everson* case was there any suggestion that the "establishment of religion clause" was the equivalent of these constitutional provisions of the states.

In *"American Church Law"* (1933), the author, Carl Zollmann, states without apparent hesitation (sec. 74, p. 86):

> "There is no provision in the Federal Constitution prohibiting the appropriation of public funds to sectarian purposes."

He continues:

> "Therefore the federal government is at liberty to make contracts with church-controlled hospitals, and may grant out and out donations to sectarian institutions. In regard to Ohio, Congress has not only appropriated section 16 to the use of the public schools, but has actually granted section 29 within a limited area to the use of religion."

We do not deny that a tax statute may be one which, by preference to a particular religion or a particular sect, constitutes a law "respecting an establishment of religion".

Concededly, one form in which a forbidden preference to a religion might be embodied would involve the appropriation of public money. On the other hand, as Story points out (Commentaries on the Constitution, 5th edition, 1891, II, sec. 1872) there are a number of ways of creating an "establishment of religion" by different methods of preferring one over another. Hence, a law respecting an establishment of religion might give a preference without imposing a tax, and we think it clear, that, as far as the First Amendment is concerned, tax support or, more commonly, tax exemption, may be given if no preference is thereby given. *The presence or absence of a tax is not the thing which determines whether a law is one "respecting an establishment of religion".*

If this Court should hold that the equal and non-preferential use of State funds or property for religious purposes, to the extent permitted by the State constitution, is a violation of the establishment of religion clause of the Federal Constitution, then it would have to hold that a similar exemption from taxation is an unlawful benefit, for an exemption is in essence an appropriation, as held by the Supreme Judicial Court of Massachusetts in *Massachusetts General Hospital* v. *Inhabitants of Belmont*, 233 Mass. 190, 203; 124 N.E. 21, 25 (1919):

> "An exemption from taxation is in the nature of an appropriation of public funds, because, to the extent of the exemption, it becomes necessary to increase the rate of taxation upon other properties in order to raise money for the support of government."

From what has been told above of the true meaning of the "establishment of religion" clause, it seems clear that unless there is a preferment of one or more sects or religions over other sects or religions, a law, whether or not it involves a tax or an appropriation, is not a law "respecting an establishment of religion". Unless, therefore, the action of the Board of Education in the present case constitutes a law favoring one or more sects over others it does not violate the establishment of religion clause regardless of whether, in the operation of the system, public monies be expended. The expenditure of public monies was a question for the Supreme Court of Illinois under the stringent provisions of the Constitution of Illinois,* but we submit it is not a concern of this Court

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* Article II, Sec. 3 of the Constitution of the State of Illinois provides in part:

> "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions; * * * No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."

Article VIII, sec. 3, is as follows:

> "Neither the general assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or sci-

under the First Amendment when the charge of preferential treatment has been eliminated.

It seems more appropriate to discuss the fact that no public monies are appropriated and that no expenses incurred, to the detriment of the appellant, under point III, below, which deals with her contention that the Fourteenth Amendment prohibits the action of the School Board because of the claim that it is a use of public monies for a private purpose. It is enough to say here that if there is any expenditure of public money, which we deny, it is not a forbidden preference to any sect or to any religion under a proper construction of the establishment of religion clause of the First Amendment.

Historically, there seems to be no question that the use of public property, impartially, for religious services or teaching, was not considered unconstitutional even under the Virginia concept of relationship between church and state. This is amply proved by the following.

Thomas Jefferson Approved Use of Public Buildings for Voluntary Religious Education Classes.

If the acts of the school board assailed here were to be held unconstitutional, great reliance must of necessity be placed upon the theory that they offend the First Amendment and that the First Amendment incorporates the provisions of the Virginia Bill for Establishing Religious Freedom, with all of its political and emotional overtones acquired as a result of Madison's Memorial and Remonstrance. Furthermore, since Jefferson's letter of January 1, 1802 mentioning the "wall of separation between Church

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entific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose."

and State" is the only authority cited by this Court in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, 15-16, in direct support of the Court's definition therein of the establishment of religion clause of the First Amendment, it would seem to be a conclusive answer to the charge of invalidity if we could demonstrate that Jefferson was not opposed to voluntary religious education conducted on public property and with the co-operation of educational institutions supported by public funds.

In other words, with so much reliance being of necessity placed on Jefferson's views by our opponents in this case, in briefs already filed and sought to be filed, it must be correct to say that if Jefferson was not opposed to, but in his own day approved, the plan of voluntary religious classes adopted in the present instance, then the opposition to such classes on constitutional and legal grounds must fail.

There exists irrefutable evidence that Thomas Jefferson, himself, did approve a similar plan. Most significantly, such approval came from him while he was in a position of official responsibility as Rector of the University of Virginia, long after the passage of the Virginia Bill for Establishing Religious Freedom, of which he was the author, and while that law was in force. Even more significantly, Jefferson's approval was given only after thoughtful and deliberate consideration of the constitution and laws of Virginia. In that situation, a program for religious education identical in relevant respects to that now used in Champaign, Illinois, was approved by Thomas Jefferson at the University of Virginia in order to comply with what he considered to be the commands of the Virginia constitution and statutes, and still enable the University to fill what he described as a "chasm" left by the lack of religious instruction.

From the very inception of the University of Virginia, Thomas Jefferson was a member of its Board of Visitors, and at the first meeting, which was held on March 29, 1819, was elected Rector, an office which he held until his death in 1826 (Jefferson, *Writings* (Mem. Assn. Ed., 1904), XIX, pp. 373-374, 499). All of the minutes of the meetings of the Board of Visitors were authenticated by Jefferson's signature and most were written in his handwriting (Jefferson, *Writings* (1904), XIX, p. 360).

He was not only the Rector, but he was the architect who designed the buildings, the overseer who saw to their proper erection, and the superintendent of construction who engaged the workmen, bought the bricks, and chose the trees to be felled for timber. (Jefferson, *Writings* (1904), XIX, p. 360). As will be shown by the minutes of the Board of Visitors which follow, Jefferson designed the rotunda of the University so as to include a room for religious worship.

The minutes of the Board of Visitors for October 7, 1822, contain its annual report required by law. Referring to the Commissioners' report to the legislature, made in 1818, which had recommended the establishment of the University, the Visitors' report said (Jefferson, *Writings* (1904), XIX, p. 411):

> "The remaining building, necessary to complete the whole establishment, and called for by the report of 1818, *which was to contain rooms for religious worship*, for public examinations, for a library, and for other associated purposes, is not yet begun for want of funds". [Italics supplied.]

Continuing, the Visitors' report—quite obviously prepared by Jefferson and in all events approved by him—discussed the omission, for constitutional reasons, of a department of divinity, and the methods suggested for filling the "chasm" thus left in the curriculum. Because

of its importance, we quote it at some length, as follows (Jefferson, *Writings* (1904), XIX, pp. 413-416; Padover, *The Complete Jefferson*, pp. 957 *et seq.*):

"In the same report of the commissioners of 1818 it was stated by them that 'in conformity with the principles of constitution, which place all sects of religion on an equal footing, with the jealousies of the different sects in guarding that equality from encroachment or surprise, and with the sentiments of the legislature in freedom of religion, manifested on former occasions, they had not proposed that any professorship of divinity should be established in the University; that provision, however, was made for giving instruction in the Hebrew, Greek and Latin languages, the depositories of the originals, and of the earliest and most respected authorities of the faith of every sect, and for courses of ethical lectures, developing those moral obligations in which all sects agree. That, proceeding thus far, without offence to the constitution, they had left, at this point, to every sect to take into their own hands the office of further instruction in the peculiar tenet of each.'

"It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences. But it was thought that this want, and the entrustment to each society of instruction in its own doctrine, were evils of less danger than a permission to the public authorities to dictate modes or principles of religious instruction, or than opportunities furnished by them by giving countenance or ascendancy to any one sect over another. A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity

the full benefit [of] the public provisions made for instruction in the other branches of science. These branches are equally necessary to the divine as to the other professional or civil characters, to enable them to fulfill the duties of their calling with understanding and usefulness. It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for the religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. Such establishments would offer the further and greater advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected, and destined to that purpose under impartial regulations, as proposed in the same report of the commissioners, or in the lecturing room of such professor.

"To such propositions the Visitors are disposed to lend a willing ear, and would think it their duty to give every encouragement, by assuring to those who might choose such a location for their schools, that the regulations of the University should be so modified and accommodated as to give every facility of access and attendance to their students, with such regulated use also as may be permitted to the other students, of the library which may hereafter be acquired, either by public or private munificence. But always understanding that these schools shall be independent of the University and of each other."

The report of the visitors then declared:

"Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion, the most inalienable and sacred of all human rights, over which the people and authorities of this

state, individually and publicly, have ever manifested the most watchful jealousy: and could this jealousy be now alarmed, in the opinion of the legislature by what is here suggested, the idea will be relinquished on any surmise of disapprobation which they might think proper to express."

That no legislative disapprobation was expressed is proved by the fact that the regulations adopted by the Visitors two years later, on October 4, 1824, made provision for the students of religious schools "should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect". (Jefferson, *Writings* (1904), XIX, p. 449).

The same regulations provided (Jefferson, *Writings*, (1904), XIX, pp. 449-450):

> The upper circular room of the rotunda shall be reserved for a library.
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> One of its larger elliptical rooms on its middle floor shall be used for annual examinations, for lectures to such schools as are too numerous for their ordinary school-room, *and for religious worship, under the regulations allowed to be prescribed by law.* [Italics supplied.]

That Jefferson fully approved the plan is clearly indicated by a portion of his letter to Dr. Thomas Cooper dated November 2, 1822, an excerpt from which letter has already been quoted (p. 72, above), in which Jefferson wrote:

> "In our university you know there is no Professorship of Divinity. A handle has been made of this, to disseminate an idea that this is an institution, not merely of no religion, but against all religion. Occasion was taken at the last meeting of the Visitors, to bring forward an idea that might silence this calumny, which weighed on the minds of some honest friends to

the institution. In our annual report to the legislature, after stating the constitutional reasons against a public establishment of any religious instruction, we suggest the expediency of encouraging the different religious sects to establish, each for itself, a professorship of their own tenets, on the confines of the university, so near as that their students may attend the lectures there, and have the free use of our library, and every other accommodation we can give them; preserving, however, their independence of us and of each other. This fills the chasm objected to ours, as a defect in an institution professing to give instruction in *all* useful sciences. I think the invitation will be accepted, by some sects from candid intentions, and by others from jealousy and rivalship. And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality."

Surely, the approval of what is the plan of voluntary religious education involved in the present case by Thomas Jefferson, author of the Declaration of Independence, author of the Virginia Bill for Establishing Religious Freedom, and no doubt the foremost advocate of the Federal Bill of Rights, is well-nigh conclusive that it does not violate the provisions of the First Amendment.

I-B.

The "establishment of religion" clause of the First Amendment refers to a Nationwide Religion, and is not binding on the several states, particularly if construed to prevent the Type of Local Educational Activity Involved Here.

An assumption that the establishment of religion clause is binding on the states was made in the appellee's brief (p. 28) in *Everson* v. *Bd. of Edu. of Ewing Twp.*, 330 U.S. 1, accompanied by a protest that the point had not been mentioned below. We strongly contend here, accompanied by the same protest, that the clause is not made applicable to the states by the Fourteenth Amendment, because the clause refers to a national establishment of religion and because of other reasons presently stated.

If a transformation is to be made in the historic meaning of the First Amendment, protecting the citizen against being compelled to subscribe to and support articles of faith and a mode of worship, so that the First Amendment becomes simply a weapon in the hands of any small minority to prevent a great experiment for the education of the youth of the land—an experiment which is being conducted at the local level, where it will be carefully watched by those whom it affects—then, we say, no great constitutional principle enforceable on a national scale is involved.

Stripped of the legal reasoning by which the result is sought to be reached, the net result now sought to be accomplished, by applying the Federal constitution to educational matters which have long been considered to be of purely local concern, is that henceforth the Fourteenth Amendment shall be used to supersede the much more specific constitutional inhibitions usually and almost without exception imposed by state constitutions. Of course,

at the time it was passed the Fourteenth Amendment was considered to have no such effect.

During President Grant's administration there was great agitation against public support of sectarian schools. In 1875, President Grant in a message to Congress urged a constitutional amendment forbidding the teaching of religious tenets in any public school and forbidding granting of any public funds for the benefit of any sect or denomination. The Republican party platform of 1876 (par. 7) called for an amendment to forbid the application of any public funds for the benefit of schools or institutions under sectarian control.[1]

This resulted in a House resolution, defeated in the Senate, for an amendment to the Federal constitution to prohibit the states from paying monies to sectarian institutions of all kinds.[2] The vote in the Senate was on strictly

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[1] AMERICAN CHURCH LAW (1933) Carl Zollman, pp. 75-76.

[2] AMERICAN CHURCH LAW (1933) Zollman, p. 76.

Said proposed constitutional amendment was as follows (Congressional Record, 44th Congress, Vol. 4, Pt. 1, p. 5580):

> "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory. District or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the contr of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization or de-

party lines, all the Republicans voting for, and all the Democrats voting against, the resolution.[3]

Being a campaign issue in the Hayes-Tilden election of 1876, the proposed amendment was drafted by James G. Blaine, a leading Republican, in language to impose a severe restriction on the states.[3] The solidly negative vote of the Democratic party in the Senate defeated the proposal on August 14, 1876 by preventing an affirmative vote of two-thirds of the Senate as required by the Constitution, Art. V. (See page 5595 of the same volume of the Congressional Record cited in footnote 2.) The restraint on the state action thus defeated in a bitter political controversy in 1876, is now sought to be imposed on the states by a judicial decision in the case at bar. The Court is asked now, seventy-five years later, to hold that the Fourteenth Amendment had in 1876 already imposed upon the states—without the necessity of the proposed constitutional amendment which was voted down—every restraint which the new amendment sought to impose!

That the framers of the defeated amendment considered the language of both religious clauses of the First Amendment insufficient and inadequate to prevent the payment of public monies to support religious education is apparent from the language of the proposed amendment which is set forth in footnote 2. This is an additional practical construction, of the establishment of religion clause against an interpretation that it restrains anything in addition to laws favoring one religion over another.

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nomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested.

SEC. 2. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article."

This is set out in AMERICAN CHURCH LAW, *supra*, note 1, p. 76.

[3] AMERICAN CHURCH LAW (1933) Zollman, p. 76.

A large majority of the states now have constitutional provisions, most of them adopted *after* the passage of the Fourteenth Amendment, prohibiting, in varying language, appropriations of state funds for sectarian purposes or to sectarian bodies. (See a list of those adopted after the Fourteenth Amendment in *American Church Law* (1933) Zollman, pp. 78-80; Also found in *"Historical Background of Religious Day Schools"*, by Zollman, Marquette Univ. Law Review, vol. 9, pp. 135-165, April, 1925). There is now no occasion, years after the adoption of the Fourteenth Amendment, for transferring from the states to the Federal Government the enforcement of such local state policy.

It may be asked why the states should complain at similar Federal restriction, implemented by the Fourteenth Amendment, if they already have provisions so specific and so drastic against aid to any secetarian purpose. The answer is a realistic one: that in a matter which concerns so closely the lives of their own people, the states want to retain the power to interpret and enforce their own specific constitutional provisions without constant appeals being made to the Fourteenth Amendment, which in this instance furnishes a rule of decision so vague that its enforcement always threatens to become an ideological matter, instead of a legal one. This desire is in accordance with national policy and national history up to this date.

This Court has held that education, under the Federal Constitution, is a matter of state power and not of Federal power, and is not to be interfered with unless Constitutional rights guaranteed by the Federal Constitution are clearly infringed—*Cumming* v. *Richmond County Bd. of Edu.*, 175 U.S. 528, 545 (1899); *Gong Lum* v. *Rice*, 275 U.S. 78, 85 (1927).

The State of Illinois has treated the matter of education not only as a matter of state concern, but as a matter of peculiarly local concern. The power of self-regulation given to school boards is great.

For example, wide discretion is held to be vested in the local school boards regarding course of study,[4] regulation of textbooks,[5] preventing school teachers from joining labor unions,[6] leasing unused portions of the school building,[7] and dividing the school district into areas for various schools.[8] The opinion in the present case is another example (Tr. 278).

Deep in the American tradition is the rule that courts do not interfere in school affairs except where the violation is clear. The self-governing functions of a board of education and the broad discretion vested in it have been recognized by the Illinois courts from the earliest days. In 1858, *Board of School Inspectors of the City of Peoria* v. *People ex rel. Henry Grove*, 20 Ill. 526, our court held (pp. 531-532):

> "The Board of Inspectors are vested with a large discretion in the performance of their important

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[4] *Powell* v. *Board of Education*, 97 Ill. 375 (1881): Board may add teaching of German to curriculum; a good review of Illinois school legislation to 1881.

[5] *Segar* v. *Board of Education*, 317 Ill. 418, 422, 148 N.E. 289 (1925): Board may require a deposit for issuance of free textbooks.

[6] *People ex rel. Fursman* v. *Chicago*, 278 Ill. 318, 326, 116 N.E. 158 (1917): Board may forbid teachers to join labor union.

[7] *Lagow* v. *Hill*, 238 Ill. 428, 87 N.E. 369 (1909): Board may lease portion of school building to a fraternal organization.

[8] *Board of School Inspectors* v. *People ex rel. Grove*, 20 Ill. 526, 531-532 (1858); *Gustafson* v. *Board of Education*, 319 Ill. App. 255, 49 N.E. 2d 311 (1943): Board may regulate area from which pupils may attend a particular school.

> duties, and the courts will not attempt to control its exercise except in a palpable case, where a plain violation of the law is manifested."

Yet, the state of Illinois as long ago as 1874 held that this discretion of the school boards must be exercised in a lawful manner, and at that early date—long before this Court has even intimated that the Fourteenth Amendment requires any such ruling—the Supreme Court of Illinois prohibited the segregation of Negro school children, even against the claim that equal facilities were being furnished to them—*Chase* v. *Stephenson*, 71 Ill. 383 (1874), holding that Negro children cannot be required to attend a separate school.

The Court stated (p. 385):

> "While the directors, very properly, have large and discretionary powers in regard to the management and control of schools, in order to increase their usefulness, they have no power to make class distinctions, neither can they discriminate between scholars on account of their color, race or social position."

The question involved in the present case is one of educational policy. Every reason which has made this court reluctant to interfere in such cases, except where a clear violation of a Federal right has been shown, still exists. In this day, it is even more urgent that adherence to such a rule be observed, because of the flood of applications—well-founded or not—which will be made to this Court if it ever enters, by the Fourteenth Amendment route, the jurisdiction over matters of such purely local concern. Were this truly a case of religious liberty, no protest could be made of the Court's jurisdiction. This is a different sort of a case. At most it concerns nothing more than (a) the use of public property, without discrimination, for religious education classes, and (b) the right of the appellant to impose her political science views in matters of education on the Champaign Board of Education.

We suggest that no clear violation of any Federal right has been shown by the appellant which justifies a holding that the Fourteenth Amendment has been violated by the action of the school board in this case.

No matter how the Court may interpret the language of the First Amendment, as it is to be applied to the Federal government, which in form it solely controls, the only means of enforcing it against the State of Illinois is by virtue of the Fourteenth Amendment.* No provision has been pointed to in that Amendment which imposes on the State of Illinois an interpretation of the First Amendment which would prevent the use of school buildings, without direct or measurable expense to the school district, for religious education.

It is this Court's nice and high constitutional duty to draw the distinction between those rights provided by the Federal Constitution which are to be applied to the States as fundamental and those which are not to be so applied because not so fundamental. In determining this question the Court has, in the past, liberally resorted to what the Framers considered to be fundamental—i.e., what were included in the term "national rights" as used by the framers and contemporaneous writers and what appeals to the reason as being fundamental and inherent in citizenship. We submit that if the Federal Government imposes upon the States only the requirement that it treat all faiths, religions, sects, and beliefs equally and without discrimination and leaves to the States within the framework of their own constitutions the extent to which non-preferential aid and cooperation of government shall be extended, it will have imposed the only prohibition which need be imposed on the national level.

*_West Virginia State Bd. of Edu._ v. _Barnette_, 319 U.S. 624, 639.

Any other result would not be in accordance with the constitutional doctrine of Federalism referred to in *Adamson* v. *California*, 332 U. S. 46. Concerning the decision in that case that the self-crimination clause of the Fifth Amendment did not bind the States, Mr. Justice Reed, speaking for the Court, said (p. 53):

> "It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship".

There is no occasion at this late date, 160 years after the formation of our Government, for the Supreme Court of the United States to impose, for the first time, more than "equal treatment of religions" upon the States. The problem of the extent to which equal aid shall be extended to religion has always heretofore been handled on the State level and is extensively treated in the constitutional provisions of the several states.

It is a problem which has been satisfactorily handled without the intervention of this Court, and it is difficult to see why the power of this Court should now be asserted. The very fact that its power has never been invoked in the history of our country is, itself, the most persuasive evidence that the power was never intended to be exercised and is not necessary to the preservation of the fundamental rights of citizens whether as citizens of the States or of the United States. *

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* A contemporaneous, uniform, legislative or executive construction of constitutional provisions adopted and acted on with the acquiescence of the people for many years has always been entitled to great weight—*Okanogan Indians* v. *United States*, 279 U.S. 655, 688 (1929); *Hanover Fire Ins. Co.* v. *Harding*, 327 Ill. 590, 603, 158 N.E. 849 (1927) and see cases, p. 60, note.

No contention was made by defendant's counsel in *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1, (1947) that the establishment of religion clause of the First Amendment did not apply to the States. That case was, however, the first case in which it was sought (and there unsuccessfully) to apply the establishment of religion clause of the First Amendment to restrain the acts of a State. It seems to have been assumed, rather than decided, that since the freedom of religion clause (*Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943)) and other clauses of the First Amendment had been applied as a protection of individual freedom against state action, the establishment of religion clause was, therefore, equally applicable as a restraint on the states with respect to their relationships with religious groups.

We submit that the correctness of the assumption that the freedom of religion clause is a restraint on State action depends on what meaning is attributed by this Court to such clause. For this reason we have discussed the meaning of the clause first (Point I-A) and we now come to the question whether such clause is a restraint upon state action.

It is, of course, freely recognized by us that the protection of an individual citizen's religious freedom is a thing so fundamental that this Court has very properly held that it was applicable to the States. We are confident, however, that the Court will find that the appellant's *religious freedom* (which because she is an atheist might better be termed "right to freedom of thought") has not been infringed. She conceded from the witness stand that her opposition to the program of voluntary religious classes was not based upon any harm that she feared it would do her son Terry, but was based on her feeling, which she described as bitter, that the classes were undemocratic and violated what she termed "the constitutional principle

of separation of Church and State" (Tr. 192-193), about which the appellant said she felt very deeply (Tr. 201).

Starting with the undoubted proposition that originally the First Amendment applied only to the Federal Government (*Permoli* v. *First Municipality of New Orleans*, 3 How. 589 (1844); *Barron* v. *Baltimore*, 7 Pet. 243 (1833)), the next question is whether the establishment of religion clause has been made applicable to the States.

The fact that the establishment of religion clause is found in the First Amendment, and that other clauses of the First Amendment have been held by this Court to apply to state action because of the passage of the Fourteenth Amendment, does not require that the establishment of religion clause be given like effect, for, as held by the Court in the opinion of Mr. Chief Justice Hughes, in the case of *Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 398 (1934) at p. 427:

> "Even the grouping of subjects in the same clause may not require the same application to each of the subjects, regardless of differences in their nature. See *Groves* v. *Slaughter*, 15 Pet. 449, 505, 10 L. ed. 800, 821; *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 434, 76 L. ed. 1204, 1208, 52 S. Ct. 607."

The decisions are clear that the Fourteenth Amendment has not, by a mechanical process, imposed the first eight amendments on the States.

Twining v. *New Jersey*, 211 U.S. 78, 91-98 (1908).

Hamilton v. *Regents of the University of California*, 293 U.S. 245, 261 (1934).

Palko v. *Connecticut*, 302 U.S. 319, 323, 328 (1937).

Betts v. *Brady*, 316 U.S. 455, 461 (1942).

Adamson v. *California*, 332 U.S. 46 (decided June 23, 1947).

Mr. Justice Roberts, speaking for the Court in *Betts* v. *Brady*, 316 U.S. 455 (1941) warned against too rigid and

mechanical an application of the first eight amendments by virtue of the Fourteenth, (p. 46):

> "In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed."

In view of the very recent discussion in *Adamson* v. *California,* 332 U.S. 46 (decided June 23, 1947), of this general question—involving, there, the self-crimination clause of the Fifth Amendment—the question is fresh in the mind of the Court and we shall attempt to state our position without too much elaboration. Mr. Justice Reed, speaking for the Court in the *Adamson* case, defined "the constitutional doctrine of Federalism" as "leaving to the States the responsibility of dealing with the privileges and immunities of their citizens except those inherent in National citizenship."

In *Palko* v. *Connecticut,* 302 U.S. 319, 329, Mr. Justice Cardozo, speaking for the Court, said that there was imposed on the States every Federal constitutional right "implicit in the concept of ordered liberty."

Since all of the Bill of Rights amendments were restrictions, in form, on Federal power, there was in the drafting of the amendments no occasion to classify them as between (1) those protecting fundamental rights of individuals, (2) those involving mere matters of procedure and (3) those involving a division of political authority between the Federal and State governments, in which last category we believe the establishment of religion clause properly falls.

As emphasizing the fact that the form of the amendments is not controlling, we here note that the House had submitted seventeen proposed amendments to the Senate, and the Senate then combined several of them. Twelve

were finally approved by both Senate and House and proposed to the states. The third and fourth propositions submitted by the House became the third amendment finally proposed, and is now the First Amendment because of the failure of ratification of the first two propositions. (*Third Annual Report,* Archivist of U.S., 1936-1937, photographs of House and Senate drafts, pp. 64-65.) In order to determine the applicability of the provision under consideration, therefore, it is necessary to do more than ascertain its place in the list of amendments. It is necessary to consider its nature.

The essential differences between the "establishment of religion" and the "freedom of religion" clauses have been discussed above (pp. 84, 88) and need not be repeated.

In determining whether the establishment of religion clause is to be applied to the states, we submit the following considerations:

By its very terms, which refer to organized religion rather than to individuals, the establishment of religion clause does not directly involve personal freedoms. That Mr. Madison did not consider the "establishment of religion" clause as protecting any fundamental right appears from the fact that he sought by his initial proposals with reference to amendments to guarantee the "rights of conscience," by "double security" against all governmental action either State or Federal, but *sought only to prevent the Federal Government from operating in the field of "establishment of religion."* (Annals of Congress, I, 434-435.)

Again, the "Rights of Man" did not involve the question of establishment or disestablishment of religion. They did include freedom of conscience, and that right was a minimum one required by all members of society against all governmental action. This was not, however, true in the field of "establishment of religion."

The establishment of religion clause did not codify or express any right uniformly recognized or protected by the States at the time of its adoption. As appears from the constitutional provisions of Massachusetts and South Carolina above (the New Hampshire constitution being similar to that of Massachusetts), several of the states at the time of the adoption of the First Amendment had "an establishment of religion."* One of the undoubted purposes accomplished by the establishment of religion clause was to divide the power in religious matters between the States and the Federal government so as to exclude the Federal government from establishing a national religion.

Madison's original proposal, ("Version No. 1," pp. 38-39, above), referred to "National religion." He came back to the word "National" in the Congressional Debates (pp. 41-42).

Madison's original amendment and his comments in the debates which have been set forth prove that the establishment of religion against which the amendment was directed was a National establishment, and that apparently the only reason that the word "National" was not used was because of the objection of Elbridge Gerry of Massachusetts, and perhaps of others who felt as he did, that the use of the word "National" indicated that the new government was not Federal but National—a matter of hot debate. In no event, however, can it be doubted that the type of establishment of religion referred to was a National one. The same language which prohibited a law establishing a religion prohibited a law disestablishing one. This protected the states both against the establishment of a National religion and interference with their own local state-aided and state-preferred churches.

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*Massachusetts, p. 74; N. H., p. 36; South Carolina, p. 56; see also, AMERICAN CHURCH LAW (1933) Zollman, p. 16.

The clause started out in Congress ("Version No. 1", p. 38, above) as an expression against the establishment of any national religion, and this thought was carried through the subsequent versions (No. 2, p. 39, above; No. 3, p. 42, above, and No. 4, p. 44) until the final one, which introduced for the first time the words "respecting an establishment of religion" (Final version, p. 47, above). The First Amendment prohibited Congressional action either for or against an establishment of religion by using the broad word "respecting". Speaking literally, there is no clause against the establishment of religion in the First Amendment. The specific objective of preventing an established religion for the United States, as a whole, was accomplished by language which made support of the proposed amendment possible both (a) by the people who objected to Congress establishing a national religion and also (b) many people in the various states who wanted the state-favored churches to continue free from Federal interference. A number of such churches continued for years after the adoption of the First Amendment.

Philip Schaff, Professor of Church History in the Union Theological Seminary at New York, has written in this vein. (*Papers of the American Historical Association*, Vol. II, No. 4; G. P. Putnam's Sons, 1888, pp. 23-24):

> "The Framers of the Constitution, therefore, had no right and no intention to interfere with the religion of the citizens of any State, or to discriminate between denominations; their only just and wise course was to leave the subject of religion to the several States, to put all churches on an equal footing before the national law, and to secure to them equal protection. Liberty of all is the best guarantee of the liberty of each."

Various types of institutions under religious auspices (schools, colleges, orphanages, hospitals, etc.), in the sup-

port of which public funds were used at least in part, were common in eighteenth century America.*

The relations of the individual colonies with the mother country had emphasized *the importance of retaining local control* in religious matters. In this respect the establishment of religion clause of the First Amendment is like the Second Amendment, which preserves the right "to bear arms."**

Although expressed in the form of a right reserved "to the people," the Second Amendment was not intended to and has not been given the effect of protecting an individual's right to carry weapons (*United States* v. *Cruikshank*, 92 U.S. 553; *Presser* v. *Illinois*, 116 U.S. 265 *Miller* v. *Texas*, 153 U.S. 535). It gives a *state* the right to maintain a militia.

Both the establishment of religion clause of the First Amendment, and the Second Amendment were concerned with the division of power between the Federal government and the States, yet both of them are couched in the same terms as rights which clearly applied to prohibit governmental action against individuals. Just as the Second Amendment has been interpreted only to preserve States' rights, so should the establishment of religion clause of the First Amendment be similarly limited in operation. The problem existing at the time of the passage of the First Amendment was not one of disestablishing a National religion already existing but to prevent the establishment of

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*See Howard K. Beale, *A History of Freedom of Teaching in American Schools*: Report of the Commission on Social Studies, American Historical Association, (New York: Scribner's Sons, 1941), Chapters I-IV, inc.

** The Second Amendment provides:

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

one. The question whether a State should have an establishment of religion was wisely left to each State. There is evidence in Madison's letter (p. 49, above) of the opposition in New England to the original constitution because of its omission of religious tests. Any attempt on the part of the Federal Government to interfere with the laws of the States dealing with religious matters would have aroused bitter resentment and resistance. We submit that the establishment of religion clause comes within that class of amendments having a meaning peculiar to the Federal Government; that at the time of its adoption it referred to the subject matter of "an establishment of religion" in a National sense only, and that such inherent meaning has not changed, so that the clause is still limited to the Federal government. Viewed from the standpoint of a citizen, his right of National citizenship is a right to be free of any "establishment of religion" on a National scale. Of course, he also is protected against any State action which invades his religious liberty, whether it be in the form of establishing a state church or not and, of course, is also protected by the due process clause of the Fourteenth Amendment.

Looking to the Fourteenth Amendment for the decision of this particular question, it is our position that the actions of the Champaign School Board do not in violation of that amendment, "abridge the privileges or immunities" of the appellant here; nor deprive the appellant "of life, liberty or property without due process of law" nor deny to the appellant "the equal protection of the laws".

We now turn to the question of whether the appellant's rights of religious freedom—as distinguished from her pocketbook and her theories of relationship between Church and State—have been violated by the acts of the school board.

II.

The Freedom of Religion Clause of the First Amendment Does Not Prohibit the Use of School Buildings for Religious Education.

We have previously indicated that the appellant has not clearly nor conventionally expressed in her "Errors Relied Upon" any claim of violation of her religious freedom, nor do we find in her argument thereof any clear and unambiguous expression of any right or rights which are claimed to have been invaded.

This makes it difficult to delineate the issue between us. We have therefore restated the constitutional question with reference to religious freedom in the broadest possible manner which might be supposed to have been intended to be raised by the appellant. This we have set forth on page 4 of our brief as:

> "*Second.* Does the voluntary Champaign plan of religious education violate the freedom of religion clause of the First Amendment?"

Subject to our jurisdictional objection previously set up, that appellant has no standing in this Court to object to a violation of her son's supposed Constitutional rights, we will discuss this second question to the extent argued by the appellant and raised by the evidence in the record.

It must be pointed out again that "the voluntary Champaign plan of religious education" is not the plan of the defendant school board, but is the plan alone of the voluntarily co-operating religious groups which have sought, obtained, and acted upon the permission of the Board of Education. It is, therefore, not "the plan" which is the subject of examination here, or which is to be reviewed by this Court, but it is the action of the Board of Education

in permitting the use of school property by the participants in "the plan". To be more specific, "the plan" of the participating voluntary groups might include less than all religious sects or denominations, or hypothetically might actually exclude some (though there is nothing in the evidence in this case to support the latter supposition), but this would not condemn the act of the Board of Education in permitting the use of school property or raise any constitutional question regarding the acts of the Board, so long as the Board stands ready at all times to permit the additional free and equal use of the school buildings, without discrimination, by all other groups and has not denied its use to any (which is the case here). (Tr. 118-120, 159-160.)

This discussion appellant introduces in her brief by recognition of the widespread practices of Bible reading and opening exercises of a religious nature in the public schools (Appellant's brief, p. 15). The Court is there referred to Bureau of Education Bulletin 1923, No. 15. We suggest to the Court that a more recent, relevant and authoritative fund of data will be found in Bulletin, 1941, No. 3 of the U. S. Office of Education and the Federal Security Agency, entitled WEEKDAY CLASSES IN RELIGIOUS EDUCATION. At page 10 of this bulletin the following information is given:

> "In approximately three-fourths of the States the laws permit or require the reading of the Bible at some appropriate time during the school program: 12 States require Bible reading, in 6 more States the law specifically permits Bible reading, and in 18 additional States permission for Bible reading is implied in the general terms of the law".

This bulletin (p. 14) lists 38 states in which children are released from the public school system for the purpose of taking religious education, and says that 488 school systems reported this practice, but these data are neither

exhaustive as of that date, 1941, nor abreast with current statistics, which it is unauthoritatively estimated would indicate there are many more participating communities.

The bulletin to which we refer is valuable, too, for its reference (p. 1) to the "1940 White House Conference on Children in a Democracy", which includes the following:

> "Despite the various efforts made by church groups to educate children in religion, the religious needs of many children are imperfectly met at the present time. It has been estimated that approximately one-half of the children and youth in the United States receive no religious instruction outside the home."

The bulletin, at page 2, also attributes recognition on the part of educators of the belief that a man "is educated only when he understands and appreciates the spiritual and ethical principles which constitute a central part of the heritage of the race."

The problem of ascertaining and delineating the constitutionally protected rights of the appellant must necessarily be undertaken with full recognition of certain fundamental premises upon which American democracy is built. These have been frequently recognized by judicial decisions and are a part of our law as well as of our beliefs as a people.

First, we are not a Godless or irreligious people but have a deeply grounded sense of spiritual values held alike as individuals, in and out of organized churches.[1]

Second, we recognize that children are not mere wards of the state but that their parents have the first respon-

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[1] *Mormon Church* v. *United States*, 136 U.S. 1 (1890); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 465, 470 (1892); *Wilkerson* v. *City of Rome*, 152 Ga. 762, 110 S.E. 895, 20 A.L.R. 1334 (1922).

sibility and correlative right to control their education and moral and physical development and well-being.[2]

Third, we believe in the widest possible freedom in developing, maintaining, and expressing ideas in every realm of human thought; equally abhorring every attempt to standardize, or mold into a rigid pattern, thought in any field to which the human mind may turn.[3]

Pointed application of these premises has been made to the field of education by our courts wherever the problem has arisen.

It is a matter of pride with the Bar of Illinois that the Supreme Court of this State was among the very earliest courts to give judicial recognition to the principle that free, public education did not carry with it the concept that the child was a creature of the state, and no longer subject to parental guidance, tuition and control. As early as 1877 that Court, in *Trustees of Schools* v. *People ex rel. Van Allen*, 87 Ill. 303, in discussing the right of the parent to control the education of his child, said (p. 308):

> "But no attempt has hitherto been made in this State to deny, by law, all the control by the parent over the education of his child. Upon the contrary, the policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated, during minority—presuming that his natural affections and superior opportunities of knowing the physical and mental capabilities and future prospects of his child, will insure the adoption of that course which will most effectually promote the child's welfare. The policy of the school law is only to withdraw from the parent the right to select the branches to be studied by the child, to the extent that the exercise of that right would interfere with the system of instruction prescribed for the school, and its efficiency

[2] *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925).

[3] See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

in imparting education to all entitled to share in its benefits. No particular branch of study is compulsory upon those who attend school, but schools are simply provided by the public in which prescribed branches are taught, which are free to all within the district between certain ages. In most primary schools it would be both absurd and impracticable to require every pupil to pursue the same study at the same time. Discrimination and preference between different branches of study, until some degree of advancement is attained, is inevitable—and, afterwards, a due regard for the interests of the child will always require it, in greater or less degree."

Again the Illinois Supreme Court said at page 309:

"It is possible that a father may have very satisfactory reasons for having his son perfected in certain branches of education to the entire exclusion of others; and so long as, in exercising his parental authority in making the selection of the branches he shall pursue, none others are affected, it can be of no practical concern to those having the public schools in charge".

This Court gave recognition to the same parental right in a case in which it was held that the interest of the parent in the education of his children was so high that it transcended the right of the state to impose a uniform culture, even in a field that the state thought important to the safeguarding of its political institutions. In this case, *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) the Court held unconstitutional, under the Fourteenth Amendment, a statute forbidding the teaching of the German language.

In the course of its decision, the Court said (p. 400):

"The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. The Ordinance of 1787 declares: 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'

Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws."

Again at pages 401-402 the Court said:

"For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child nor any child his parent . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

'The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. Unfortunate experience during the late war, and aversion toward every characteristic of truculent adversaries, were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state, and conflict with rights assured to plaintiff in error. The interference is plain enough, and no adequate reason therefor in time of peace and domestic tranquility has been shown."

This was followed and further extended in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) where the Court held

unconstitutional a law of the State of Oregon, the purpose of which was to require all able-bodied children in the state to attend the public schools with the effect of abolishing private and parochial schools. This Court clearly and succinctly expressed the right of the parent to control the education of his child in the following language (p. 535):

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The Court has thus held unconstitutional any interference with the right of parents wholly to withdraw their children from the public school system and to educate them at private or parochial schools. This, the Court has done in recognition of the right of the parent to control and vary the culture of his child in the matter of religion, as well as in other educational fields. Basically, what is involved in the instant case is the right of parents, not possessing the financial means to send their children to private or parochial schools, to exercise a much more limited right in furtherance of their children's welfare and religious culture. The greater right exists to withdraw children wholly from the public school system for education in private or parochial schools. The lesser right is to direct the children's release for a short period each week. It would seem clear beyond argument that since parents have the greater right, they also have the lesser; provided, al-

ways, of course, that similar rights of other children than their own are not thereby curtailed.

It is to be noted that while this Court was asked to and did throw the full weight of its constitutional authority behind the right of the parent wholly to withdraw his child from the public school system, all that is sought here by the appellee is that the Court permit the exercise of a similar but lesser right. While it was necessary for this Court to hold the action of the state unconstitutional to protect the greater right, it will only be necessary to abstain from interfering with state action to preserve the lesser one in the instant case.

It may be argued that the parents of children participating in weekday released-time religious education courses may exercise the same right wholly to withdraw their children from the public school system as is exercised by the parents of parochial school children. But this flies in the face of the many decisions of this Court that constitutional rights need not be purchased and that they do not depend upon the financial resources of the individual who asserts them. In the words of Mr. Justice Douglas in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) at page 111, "freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way".

This case, like many cases that come before this Court, involves the conflicting claims of citizens to their respective rights. In passing upon them, the Court, while properly concerned about the rights of minorities must still—since this is a democracy—consider equally the rights of majorities.

Here a decision adverse to the appellees will directly

affect about eight hundred and fifty children presently taking the courses in Champaign and, indirectly, perhaps two million others throughout the nation. The Champaign children, at least, will have to stop attending classes that they wish to attend. Such a decision will also affect the one child, James Terry McCollum, whose parent is objecting. The effect on Terry, however, will not be to alter Terry's educational program, for he and others whose parents feel as appellant does are not now attending the classes. Stopping classes for 850 children seems too great a price to pay to vindicate a theory of political science held by appellant since college days (Tr. 193, 201).

Rights of parents to exercise a dominant voice in the education of their children, already recognized by this court in the *Pierce* v. *Society of Sisters* and *Meyer* v. *Nebraska* cases, are said by appellant to be in conflict with the right of an irreligious or unreligious taxpayer to be free of the infinitesimal and unmeasurable expense claimed, but not proved, to be involved in the use of school buildings for religious education. Similarly the rights of religiously inclined children, as citizens, to study religious education are said by appellant to be in conflict with the right of a child to be free from the "embarrassment" of a separation from his classmates which occurs as a result of his classmates freely electing to attend the religious education classes.

These are the rights which are invoked by the positions of appellee and appellant, respectively, and no amount of nimbleness with language or characterization by weighted or colored words will alter them.

In deciding these conflicting claimed rights, it will at once appear that the rights of Mr. and Mrs. Bash, the intervenors, as parents of the child Wanda Bash, to see that she is afforded an opportunity to receive religious

education is correlative to the claim of the appellant that her son shall not receive religious education. It will also quickly appear that this right of the former has been exercised without any denial or impairment of the corresponding right of the latter. Similarly the right of the child, Wanda I. Bash, to the free and equal use of school buildings in taking such courses has been exercised without more, at the very most, than the intangible and insubstantial embarrassment of the feelings of James Terry McCollum which is said to result from his being the only one of his class who did not take the religious education work during one semester. His substantial correlative right to remain free not to take religious education or if he wished to use the school building to study atheism has been wholly unimpaired.

In this process of weighing the competing rights of the appellant and the intervening appellees, the language of this Court, speaking by Mr. Justice Douglas, in *Murdock v. Pennsylvania, supra,* is to be taken into account:

> "* * * the rights with which we are dealing are not absolutes."

In every case involving a claim that rights of personal freedom protected by the Constitution have been invaded the Court is required to make a delicate decision. This problem is intensified and complicated when competing rights of different individuals are involved as is the situation here. In the determination of these rights, it is not suggested that the rights of the minority are not to be given the highest protection, but it is suggested that where substantial rights of the majority are also directly involved, the importance of the rights of one is no greater that the importance of the rights of the other. Neither is the fact that a particular applicant for relief is in the minority any evidence in and of itself that his rights have been invaded.

The attack of the appellant upon the program, as it operates in Champaign, is focused, so far as it is based upon an appeal to the "freedom of religion" clause of the First Amendment, upon "an instruction in the school building and during school hours which will segregate the various religious and non-religious groups in the public school" (appellant's brief, page 19), upon the supposed embarrassment which results to those pupils not participating in the program and, lastly, upon the further supposed "friction" which it is said will result from the holding of religious education classes in the school building.

Oddly enough, the appellant's attempts to substantiate these charges of "segregation", "embarrassment", and "friction" are supported, not by a reliance on the record made in the trial court in this case, but by reference to dicta from the decision of the Supreme Court of Illinois in another case decided thirty-seven years ago, *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 92 N.E. 251 (1910) and by reference to a number of similar cases not even from Illinois, but from other states, (appellant's brief, pp. 26-27).

These cases, all or most of them decided before week-day released time programs were inaugurated, and, of course, in no way involving any such practice, condemn as unconstitutional the conduct of religious worship *as an integral part of the compulsory public school program.* These cases involved religious services, usually part of the opening exercises, typically including singing of hymns, repetition of prayers and reading of the Bible. The complainants in each of these cases objected because the complainants were either required to participate therein or to make application *to be excused* from a service which they found offensive either because the version of the Bible used or the nature of the religious services violated

their religious beliefs. At least so far as these cases prohibit the reading of the Bible, they are in the minority,* and, at any rate, have no application to the release of children from the school program for the voluntary study of religious education inside or outside of the public school buildings, under teachers supplied at the expense of and under the control of others.

In order to prove that her constitutional rights have been violated, the appellant also refers (brief, p. 28) to purely hypothetical situations and to a document called *Race Relations in Chicago,* which obviously does not involve or refer to any facts existent in the City of Champaign, as is admitted by appellant herself.

Appellant's unwillingness to rely on the evidence in this case for support of her claim that her rights of religious freedom have been invaded, is, of course, occasioned by the fact that the testimony taken at the trial was overwhelmingly against her. She makes only two transcript references to prove "embarrassment" to her son—transcript 175 and 193.

The first of these (Tr. 175) contains testimony of the appellant's child, James Terry McCollum. After referring to the single occasion when he was placed, during a religious education class, in the hall instead of in the music room, as was an otherwise uniform practice, he testified, "When I was out there on that occasion the kids that went by teased me". There is nothing whatever in the context or elsewhere to indicate that this teasing was about his religious views, his non-participation in the religious education class, or anything connected with either one. A more revealing statement, and one indicating that he had actually no feeling of embarrassment because of his re-

* American Church Law (1933) Carl Zollman, secs. 81-82, pp. 93-95.

ligious differences from his fellows, is contained in his testimony that "I make no secret among my playmates and acquaintances that I am an atheist" (Tr. 184).

The record is replete with his references to his having volunteered to fellow boy scouts, neighborhood playmates, and schoolmates his atheistic beliefs, and, in fact, the testimony indicates that like his mother he feels that his unbelief in religious is a gratifying mark of distinction (Tr. 183-186). An instance of such attitude is contained in his testimony:

> "I have felt no sense of shame about being an atheist. I sort of enjoyed being different from other people with reference to the matter of God. I am rather proud of the position in which I am put by not believing in a God. In a way it is sort of fun to be an atheist; in a way it is not" (Tr. 184-185).

With reference to this question of whether or not he was actually subjected to embarrassment, the trial court's opinion contained the following specific finding of fact (Tr., 68):

> "Without reviewing all the evidence the court believes the great preponderance of the evidence shows that James Terry McCollum was not subjected to any humiliation, ridicule, ostracism or embarrassment because of his religious opinions, but that his difficulties were due to his own personality problems, entirely disconnected from any question of religion".

Appellant's second transcript reference to support her contention that the program in actual operation caused her son "embarrassment" is even less valuable for her purpose. A full quotation follows (Tr. 193):

> "I asked her [Mrs. Taylor, Terry's teacher] if Terry had to wait in the hall that day and she said he did during the religious education class; that he was provided with a desk and there was sufficient light, and he had books and material to work with.

> She said that she was not aware that there had been any feelings on Terry's part. I told her he had come home crying, very much upset, and had said that he sat in the hallway and that children going through the hallway and seeing him there had assumed he was there for punishment, since occasionally if a child does not conform he is seated in the hallway, *and that was the assumption upon which the children had ridiculed or teased him.* He was very much upset. She said she was sorry, that ordinarily Terry had been allowed to sit in the music room." (Italics supplied)

This leaves appellant entirely dependent for proof of embarrassment to her son from the operation of the religious education classes to reports of other cases—the Illinois *Ring* case and similar cases from other states mentioned in her brief.

That the embarrassment referred to in those cases does not exist in the instant case, is specifically found by the Supreme Court of Illinois in the decision from which this appeal is taken. In that opinion, the court below, after referring to the discussion of embarrassment in the *Ring* case [245 Ill. 334, 92 N.E. 251, (1910)], says (Tr. 274):

> "That appellant's son was so subjected is refuted by appellant's own testimony wherein she testified, 'As for religious education in the public schools, it would not have a bad effect upon Terry [meaning her son] I do not know it would bother him one way or the other. I did not know it until in court.' "

This brings us to a discussion of the appellant's claim that an unlawful "segregation" of pupils is occasioned by the fact that some pupils take religious education and some do not and that this violates her rights under the freedom of religion clause of the First Amendment.

On this issue we suggest to the Court that there is nothing whatever in the record to show "segregation". This is simply a gratuitous and unfounded coloring of facts by the use of a "weighted" word.

What the record actually shows is that as a result of the free exercise of a privilege granted to all pupils in the school system, some elect to take religious education and some do not. This separates pupils, one from the other, for 30 or 45 minutes each week in the same way, and no other, as occurs when some elect to take music and some elect not to take music. There is no evidence whatever that this voluntary system does "segregate" children into religious and non-religious groups. One student in five in the grade schools and four students out of five in the junior high schools did not take religious education (Tr. 258). Numerous students who did not take religious education testified that they did not feel the slightest coercion to participate in the course or embarrassment at not participating. Those who do not participate are motivated by many reasons. Many such students are church members. Some are not. (Tr. 243, 245, 246, 247, 248, 250, 251, 252, 253, 254, 259, 262, 263, 264) Some do not attend because there are other subjects which appeal to them more. Some get all the knowledge of religion which they wish from other sources. Some are too interested in or behind in, their regular subjects to spare the time. One, namely, James Terry McCollum is an atheist and his mother desires to avoid exposing him to the courses either because of his atheism or, perhaps more accurately, only because of her views that the classes violate her firmly-held political view of absolute "separation of church and state."

Thus, pupils who do not enroll in the courses fall into a conglomerate mass. Failure to participate stamps no one an atheist, discloses no religious scruples, assigns no reason. Only those who elect to participate disclose anything regarding their religious affiliations or beliefs, and this is only because they choose to do so and is in a

manner which even the most avid secularist could not call offensive.

It is impossible to determine whether the claim of "embarrassment" to and "segregation" of the appellant's son is that it results from the existence of the released time plan or from the presence of the classes in the school building. It is probable that if the classes were not held in the school building, she would still object to the released time plan, because on page 25 of her brief, after having relied on the repeated claim that the use of school buildings involves an expenditure of public moneys, appellant makes the seemingly inconsistent and self-contradictory statement that "as a matter of fact it is not the use of public school buildings and of public school teachers which violates the constitution; it is the maintenance of instruction by religious groups in the public schools through the use of the resources of such schools".

If the above excerpt indicates that her claim is that there is "an unconstitutional social pressure" (as we might phrase it) on her son by reason of the mere existence of the released time program—whether or not classes are held in the building—then an answer is that every court wherein such a contention has been made has overruled it.

It was raised in the briefs in *People ex rel. Latimer* v. *Board of Education of City of Chicago*, 394 Ill. 228, 68 N.E. 2d 305 (1946) and overruled. It was raised in the instant cases and overruled in the following language (Tr. 274):

> "The *Ring* case [245 Ill. 334, 92 N.E. 251] is cited in support of the proposition that the exclusion of a pupil from this part of the school exercises puts him in a class by himself and subjects him to a stigma. We hardly see the difference in this respect as to the situation in the *Latimer* case, above referred to, where groups were excused for one hour each week during the regular school period for the

> purpose of attending religious education classes at places outside of the school property and thereafter returned to the public-school room. The same might be said there that those remaining were subjected to a stigma. That appellant's son was so subjected is refuted by appellant's own testimony * * * " [continuing as previously quoted].

The same possibility of embarrassment and segregation was involved in *People ex rel. Lewis* v. *Graves*, 245 N.Y. 195, 156 N.E. 663 (1927) which sustained a plan of released-time not involving the use of school building, which use is expressly prohibited by the New York constitution.

The claim that a released-time plan (not involving the use of school buildings, but equally vulnerable to the charge of "embarrassment" and "segregation" as a plan which uses the school buildings) was unconstitutional was recently denied in the case of *Gordon* v. *Bd. of Edu. of Los Angeles*, 78 Cal. App. 2d 498, 178 P. 2d 488 (1947), review denied by the California Supreme Court. The *Gordon* case cited the case at bar with approval. It also quoted with approval the following language from *People ex rel. Lewis* v. *Graves*, 219 App. Div. 233, 219 N.Y. Supp. 189, 196, the intermediate appellate decision of *People ex rel. Lewis* v. *Graves*, previously mentioned:

> "The State by its educational policy seeks to build from its youth useful citizens of intelligence and character, not merely pendants and philosophers. In following this policy it should not only consider the wishes, but invite the aid, of parents. When the wish of parents for weekday religious instruction for their children involves no serious interruption to school attendance, the state can have no purpose to defeat it. If local school authorities render their assistance by methods so innocuous as those detailed here, it does not amount to illegality. Reasonableness in the method adopted is the test of such legality. Neither the local school officers nor the commissioner of education have here violated that rule."

The California court further said in its opinion (178 P. 2d 488),

> "They [framers of California constitution] proposed to insure separation of church and state, and to provide that the power and authority of the state should never be devoted to the advancement of any particular sect or denomination. Our pioneer forefathers did not have the remotest idea that they were laying the foundations of the great Commonwealth of California that was to be as a jejune, godless state; they believed one of the great pillars of our national strength to be the general acceptance of religion by our people."

None of these courts has found anything whatever in the actual operation of similar programs to justify a holding that "segregation" or "embarrassment" is caused to individual students or if so caused such "segregation" or "embarrassment" constitute any impairment of constitutionally protected rights of religious freedom. At most, the result is the social consequence of the exercise of an individual right.

If either the relator or her son has felt anything which they interpreted as coercion or embarrassment, it must have come from their hostility to religion, which they proclaimed from the housetops (Tr. 1-2, 205, 182-186). It was not the result of the presence of the religious education classes in the school building, but must have been because they chose to make a parade and display of their atheism. The law cannot protect people against the social consequences of their atheism. What it can and does protect against is discrimination by the law and the government. When that duty is fulfilled, the social consequences of pursuing a course belong just as certainly to the individual as does the right in the first instance to make a choice between atheism and religion.

The unsoundness of the position of the appellant in con-

tending that the presence of these courses in the public school building is a violation of her own and her son's religious liberty, which she says arises from the fact that religious differences are thus pointed out and embarrassment results, is demonstrated by the ridiculous conclusion to which this line of argument leads. There are many other activities in connection with the operation of a public school, always recognized as proper, which much more pointedly underline and mark religious differences.

For instance, it is the almost universal practice to inculcate respect for our national ideals and our flag by flag exercises and by the singing of "The Star Spangled Banner," "America," and "God Bless America." This Court has held that persons such as Jehovah's Witnesses having religious objections to saluting the flag must be excused from such exercise: *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

Giving approval to the claim of appellant that religious instruction given to other children than her own is a violation of her own child's religious freedom would require a rewriting of that decision. As it now stands, it holds only that school children cannot be compelled against their will to salute the American flag and recite an oath of allegiance to the Nation. This is simply the same principle enunciated in the *Ring* case (245 Ill. 334, 92 N.E. 251). Opposing counsel would now extend the holding of the *Barnette* case so as not only to require that objecting children must be excused from the flag salute exercise, but that the exercise itself must be removed from the school to prevent those not participating from having their religious differences noted and being exposed to "segregation" and "embarrassment."

Are we to cease permitting, and in fact encouraging, the singing of the national anthem and "America" and "God Bless America" in our schools because children

of atheists will wish to be excused from joining in, due to the fact that these songs recognize the existence of God and attribute to Him the blessings which we enjoy? If we do not ban these songs from the school, the appellant's child and others like him will, according to this reasoning, have their religious differences noted and will be subjected to "segregation" and "embarrassment."

Even the school cafeteria, an institution almost inseparably tied up with our modern educational system, must be eliminated for similar reasons because the orthodox Jew must refuse pork and the Catholic must frequently, on Fridays and days of abstinence, refuse all meat. The question arises, must we eliminate either the cafeteria, or meat from the menu, to avoid putting children of Jewish and Catholic religious beliefs to the possible "embarrassment" of disclosing their religious affiliations by declining meat?

In these analogies which we suggest for the Court's consideration, the failure to participate is almost always, if not wholly, upon religious grounds. At any rate, it is much more often upon religious grounds than is non-participation in the religious education courses involved here. And yet, even the appellant will not be willing to go as far with these analogies as the inexorable consequences of her arguments naturally and certainly lead her.

Notwithstanding, appellant's claim of religious freedom for herself and vicariously for her son, there runs through her argument a curious thread of hostility to the exercise of similar rights by others. She is particularly disturbed at the prospect of religious freedom for the sect, Jehovah's Witnesses. At page 27 of her brief she refers in an uncomplimentary way to their practices in what is an apparent attempt to create a religious prejudice in the mind of this Court, and having assumed her success in that regard, to appeal to such prejudice in

order to prevent the continuation of the voluntary plan of religious education now in effect.

We do not believe that this Court will restrict the religious freedom of people generally, exemplified by this voluntary system of religious education, because of any distaste which appellant may have for the religious practices of any particular group. The very cases cited by appellant place beyond the pale of judicial decision any such consideration, as does *City of Blue Island* v. *Kozul*, 379 Ill. 511, 41 N.E. 2d 515 (1942), in which the Supreme Court of Illinois has shown an equal anxiety with this Court to protect the rights of religious minorities.

Not content with her references to the Jehovah's Witnesses, the appellant, throughout her brief, attempts to touch every discordant note of religious intolerance—not deigning to omit reference to anti-semitism. If it be a fact that religious strife is a pressing issue in this country, which may well be doubted, one of the remedies is the teaching of religious tolerance and of mutual respect for the religious views of others, which is the cornerstone of the program under attack (Tr. 102, 142-143, 156, 157, 159-160, 227) and the proven result of its operations (Tr. 159, 153, 230-231).

As appellant's argument develops, a similar unwillingness to confine her complaints to the facts in evidence, leads her to deplore "friction" which *will* result from the plan. None is pointed to in Champaign, but it is said that it may occur in the future. She fears different groups in other parts of the State may gain dominance or seek similar cooperation from the school authorities. As pointed out above, inculcating mutual respect for and tolerance of others' opinions is a cornerstone of the program. Adherents of the Catholic, Jewish, and Protestant faiths have and do cooperate, there and elsewhere. "Friction" has not resulted in Champaign. If it were to develop, com-

mon sense would operate to remove the errors of administration which caused it, or, if irremediable, to terminate the program. As an ultimate resort for the remedy of abuses, this Court is always here.

This seems to be a good place to point out again that there is a distinction to be observed in studying appellant's arguments, between the acts of the school board, which are here being reviewed, and any errors, real or imaginary, which may be found in the manner in which the Champaign Religious Education Council may carry out their own plan.

This constant reference on the part of the appellant to the hypothetical and imaginary, displays an overwhelming temptation on her part to condemn, not what has lawfully been done, but what may unlawfully be done at some future time.

Of course, even a statute of general application is not unconstitutional merely because something wrongful may be done under pretense or color of it. The rule in *Montana Co.* v. *St. Louis Mining Co.*, 152 U. S. 160 (1894), quoted from *Stuart* v. *Palmer*, 74 N.Y. 183, 188, which stated that "the constitutional validity of law is to be tested, not by what has been done under it, but what may be, by its authority, be done," was accurately modified in this Court's opinion as follows (p. 170):

> "This test is accurate, provided, of course, it is limited to what may rightfully be done, and does not extend to that which is wrongfully, though under pretense of the statute, done."

Applying this rule, we point out that since what is done in Champaign is constitutional and lawful, what may imagined *will* be done improperly, elsewhere, at a later date under a pretense that it is justified by the decision of the present case should not control this decision to our detriment. This, we submit, is hornbook law.

In 11 Am. Jur. 754, "Constitutional Law," Sec. 111, it is said:

> "One cannot invoke, in order to defeat a law, an apprehension of what might be done under it and which, if done, might not receive judicial approval; to complain of a ruling one must be the victim of it."

Here, the appellant does not seek to invalidate a law of general application, but attacks the validity of specific conduct of the school board by seeking to show that at other times and places and under different conditions, conduct of a somewhat similar nature would be unconstitutional. The question before the Court now is whether on the facts in this record there has been a violation of Federal constitutional rights; not whether on some other occasion, at some other place, other acts of other persons will violate the constitutional provisions sought to be invoked in this case.

That this case is to be decided, not upon imaginary circumstances or supposititious problems which may arise from the decision of this case, but upon a consideration of the actual record involved, will be apparent to your Honors, as it was to the appellate judges who decided *People ex rel. Lewis* v. *Graves,* 219 App. Div. 233, 219 N. Y. Supp. 189 (aff'd 245 N.Y. 195, 156 N.E. 663 [1927]) where they said (219 N. Y. Supp. 189, 193):

> "The Constitution is designed for practical purposes and deals with realities, not fictions or conditions largely imaginary. It is intended to operate benignly in the interest of the governed. It should receive a broad, not a petty, construction."

The truth is that appellant's claim that her religious freedom has been invaded is so ephemeral and unsubstantial as to indicate that it is based not upon any real harm that has either been worked or is feared by her, but rather upon her zealous adherence to the political prin-

ciple of "separation of church and state" which she interprets to forbid this cooperation between the Champaign Council of Religious Education and the defendant Board of Education. This will be apparent from the following excerpt from her testimony at the trial (Tr. 192 and 193):

> *"It was not that I feared that anything taught in those classes would be harmful to Terry,* but that I was bitterly opposed to the whole system as being undemocratic. *To my way of thinking it defeated the constitutional principle of the separation of church and state.* I thought I was being a hypocrite if I allowed him to join in when I opposed it bitterly, merely for the purpose of having him conform to the rest of the children. *I did not think the teaching would harm him or make much difference either way. My concern was that it was a means for the breaking down of the separation of church and state.* I realized in taking this stand against religious education classes participation it was doing Terry harm, making it hard for him. I felt that in the long run it was the only action that I myself could take." (Italics supplied.)

On cross-examination, she stated (Tr. 201):

> "My belief in the doctrine of the separation of church and state is one about which I feel very deeply. It does not influence my attitude towards religious education and religious education in the public schools as it is conducted in School District No. 71. If the court decides that this is definitely within the boundaries of the constitutional limitations, definitely constitutional, I have no further objections".

From this language appears also the other obvious weakness in her appeal to this Court. She makes no pretense or contention whatever that her own rights of religious freedom have been invaded or indeed touched in any way. Rather, all of the evidence which she offered on this issue was with reference to her son Terry. But that this does not raise a justiciable question for decision by this Court we have already pointed out in our discussion of jurisdiction.

It must not be forgotten that the program of religious education, here under attack, is not an isolated instance of the exercise of religious rights by religious people or a deliberate exercise of their rights for the purpose of testing the limits of this Court's patience. The program is rather the spontaneous and widespread reaction of the American people to the secularism which has progressively encroached upon our educational system until educators, as well as religious leaders, are shocked and frightened by the consequences.*

Materialism has on every hand crowded out spiritual values. Crime and juvenile delinquency have grown and the problem remains unsolved. Divorce has increased alarmingly and no solution has been found.

The plain fact is that many sincere persons believe that we must find some method, within our constitutional framework and our democratic processes, with which to combat secularism and materialism and to instill in young minds some perception of the essentiality and worthwhileness of spiritual values, the relative importance of religion in life, alongside of other fields of human thought, activity and expression, such as music, art, the sciences, athletics and vocational training.

Nor is it any answer, but more nearly is it an intended sarcasm, to say that the place for this moral and religious

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*American Church Law (1933), Carl Zollmann, p. 82, sec. 69:

"The consequences of a godless education can be studied today at close hand in any penitentiary, house of correction, or reform school. They are vitally felt by every teacher from the kindergarten to the University and by every business man from the corner grocer to the president of the most powerful bank. They fill the courts with litigation, the jails with inmates, and the cemeteries with corpses."

training, is in the home or in the church. Just what is meant by this is not clear, but if it is an appeal to history, it proves nothing at all. All of the functions now performed in the school were once performed, to the extent that they were performed at all, in the home, the church and the church school. In society at a more primitive stage all were performed in the home.

With the acceptance of the responsibility for free public education by government, which acceptance was not made until after our Constitution was written, one after another of these fields has been pre-empted in part or in toto by the school. In the process, religion which was once a part of every school curriculum, has been crowded out more and more until only thirty-six states retain any vestige of it and they principally by an opening exercise of brief Bible reading and singing of hymns. [It is to be noted that if appellant's views are accepted by the Court, even this gesture of recognition of religion would be prohibited.]

Every subject in the curriculum having once been taught in the home, and having been taken over by the school, it might be said with equal validity that the place for teaching vocational training or music, or athletics is in the home. If the statement that the place for religious instruction is in the home is not an appeal to history, what is it? Does it suggest that parents possess special ability as teachers of religion? No one ever suggested that this was true in any other field—so why religion? Is it not reasonable to suppose that parents, who want their children to know more about religion than they themselves do, will welcome the opportunity for them to study it out of the home, as readily as they welcome the similar opportunity for their children to study algebra, or music, or sex, and for the same reason?

As to the function of churches in religious education, they do, of course, have a very great responsibility. What is this function? It is primarily the furnishing of qualified teachers with the necessary religious background and in the instant case they are fully performing this function. It is the place of the teaching that is in question. Why is the church such a peculiarly good place? It might as fittingly be argued that the place to study civics is the Legislature, music in the recital hall, vocational training in the factory, hygiene in the hospital, ad infinitum. The real truth is that all are taught in the school for practical considerations of safety, convenience and efficiency.

The courts have uniformly upheld the right of school authorities to release children from the school program for limited periods for study of religious education.*

This right is apparently not questioned here by the appellant in any way. What is questioned and all that is challenged is the place. What gives this objection to place any right to be heard when it is religion that is being considered instead of music or dancing or woodworking? Do not the same considerations of safety, efficiency and convenience apply to the one as to the other? It is conceded that the parents have the right to request, the school board to permit, and the children to participate, in religious education classes. Why, then is not the school building, where the children are at the time of their release, the proper and the natural place? Why is the church building, as in Champaign a mile or more away (Tr. 158, 242), such a fitting place—so much more fitting that it is

People ex rel. Lewis v. *Graves*, 245 N.Y. 195, 156 N.E. 663 (1927); *People ex rel. Latimer* v. *Board of Education of City of Chicago*, 394 Ill. 228, 68 N.E. 2d 305 (1946); *Gordon* v. *Board of Education of City of Los Angeles*, 78 Cal. App. 2d 498, 178 P. 2d 488, (1947) review denied by California Supreme Court.

the "only place for religious education"? Do not the school authorities have the right to determine whether school rooms are available for this purpose without impairment of their primary use for school purposes? Why may the school board not give consideration to the safety of children and their protection from traffic hazards shown in this case to be a very real danger?

The real truth is that the retort "the place for religion is in the home and in the church" is an unfounded assumption that religion is constitutionally quarantined to the home and to the church. This brings us back to a legal constitutional question and involves the interpretation of the words "establishment of religion" in the First Amendment. In doing so the Court may more properly give effect to the fact that the place for religion like justice, ethics, truth or education is everywhere, its only limits being the constitutional right of others.

Akin to the contention that "the place for religion is in the home and the church" is the assertion that the religious education movement is an attempt to "invade the school". Far from "invading the school", religion has first been crowded out of the school, and, secondly, the time heretofore available in home and church has been "invaded" by the school until a further impairment of opportunity for religious training has been effected. Not only has the constant growth of the school curriculum resulted in a gradual lengthening of the school session, but extra-curricular school-connected activities have multiplied until the school dominates the life of a child. When the school contented itself with the teaching of the three "R's" there may have been enough time remaining for family life and church life to include religious training, but, school sponsored athletics, glee clubs, dancing, recreation and education clubs, Boy Scouts, Girl Scouts and other similar and re-

lated activities as well as the increasing burden of homework brought home from the school has ousted the home and the church alike from opportunity for religious teaching. Educators cannot logically complain, nor do they, of the use by religious groups of the small amount of time requested for religious education.

In approaching the question of constitutionality of what has been done here, the Court cannot overlook the fact that it is dealing with an experiment, a great one on a nation-wide scale. A freely tolerant grouping of religious people has been achieved on the community level and sectarian differences have been laid aside in a common and overshadowing purpose to bring religious and spiritual values into focus with secular and material ones.

If given an opportunity, public discussion, experiments, trial and error, will determine its worthwhileness and its fate. It gives great promise of being and well may be the balancing influence which is needed for the evils it is designed to meet.*

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*AMERICAN CHURCH LAW (1933), Carl Zollmann, p. 82, sec. 69:

"Is it any wonder that a remedy is sought by which to bring back religious training to the children of the country? The outcry for such a remedy is universal. It comes from parents, educators, school officials, business men, church men, and from those placed in charge of criminals and juvenile delinquents. Such a remedy is proposed by a system of religious day schools which co-operate rather than compete with the public schools. This has been attempted in various parts of the country, and has already achieved some measure of success. It is, however, still in its swaddling clothes, and its growth will be very largely influenced by the court decisions which will be rendered on its constitutional aspects. Whether or not credit may be given by the public schools for such instruction, whether such instruction may be imparted in the public schools themselves or must be given outside, are questions which

We suggest that the words of Mr. Justice Holmes, speaking for this Court in *Missouri, Kansas & Texas Railway Company* v. *May*, 194 U.S. 267, (1904) are appropriate (p. 270):

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts".

We would add to this, that Boards of Education, being in intimate contact with the people, are sensitive to the people's welfare in quite as great a degree as the courts.

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are unsettled and can best be settled by judicial opinions on the constitutionality of such action. One of the essential tasks to be performed, therefore, relates to the work of fitting these new religious schools into the constitutional restrictions of the various states."

To the same general effect is the recent case of *Gordon* v. *Bd. of Edu. of Los Angeles*, 78 Cal. App. 2d 498, 178 P. 2d 488, 494, (1947; review denied by Cal. Supreme Ct.).

III.

The use of school buildings for voluntary religious education classes and the handling of parents' request cards by teachers do not deprive the appellant of property without due process of law in violation of the Fourteenth Amendment.

As pointed out in the jurisdictional portion of this brief, the claim by the appellant that the use of school property was unconstitutional was based, in the Supreme Court of Illinois, solely on the supposed violation of Article VIII, section 3, of the Constitution of Illinois (set forth above in the footnote on p. 92) and upon an Illinois statute almost identical with the constitutional provision (Illinois R. S. 1945, Ch. 122, Sec. 15-14). This has been admitted by appellant on page 3 of her brief opposing the motion to dismiss the appeal. (See p. 5, above.) Since this was her sole reliance in the Court below, therefore no question arises under the Federal Constitution as to this point.

We submit that both because the appellant did not raise, in the Court below, the alleged violation of the Fourteenth Amendment in the taking of her property without due process of law, and because the record shows the appellant's tax burden has not been increased and that the School Board has not made any expenditure in connection with the religious education classes, no substantial Federal question is presented on this point and the appeal should be dismissed. Without waiving this point, we submit the following.

We readily agree that in matters of fundamental religious freedom the amount involved is not the criterion of legality. A differentiation must be made between a small expenditure accompanying an illegal action and a set of

facts where the alleged illegality consists solely of the imposition of the tax. Should the Court find, as we think it should, that the appellant's religious liberty has not been infringed, her complaint that a tax has been levied should be dismissed on the grounds stated by the Court below, *de minimis non curat lex.*

As Mr. Justice Holmes said for this Court in *Noble State Bank* v. *Haskell,* 219 U.S. 104 (1910), which involved a law taxing all banks for a system of state insurance of bank deposits (pp. 110-111): "In answering that question, we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power.

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to a return of what remained of it if the purpose were given up (see *Danby Bank* v. *State Treasurer,* 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is es-

tablished by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what; in its immediate purpose, is a private use. *Clark* v. *Nash,* 198 U.S. 361; *Strickley* v. *Highland Boy Gold Min. Co.,* 200 U.S. 527, 531; *Offield* v. *New York, N. H. & H. R. Co.,* 203 U.S. 372; *Bacon* v. *Walker,* 204 U.S. 311, 315. And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co.* v. *Indiana,* 177 U.S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

It has frequently been held that in the application of the Due Process clause, wherein matters of taxation by a State were in question, absolute uniformity of taxation is not required. In *Madden* v. *Kentucky,* 309 U.S. 83 (1939), Mr. Justice Reed delivering the opinion of the Court and quoting from *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U.S. 232, 237 (1889) said (p. 88):

> "This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation', and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies."

We do not for one moment concede that under the First Amendment to the Federal Constitution the granting of equal and non-discriminatory use of public property, for a half hour or an hour a week, to children who wish to study religion on an educational basis and to the extent permitted by the states, may not be treated by

the states as a public purpose. The cases which we have cited holding that this is a religious Nation indicate that in matters of service to the public, states are not forbidden to recognize the existence of religion. Allowing the use of school rooms for religious education purposes is no different today than was the use of the County Court House at Charlottesville for divine worship in 1822, referred to in Thomas Jefferson's letter to Dr. Thomas Cooper, set out on page 72, above, and is not any different than allowing the American Legion, an historical society, or any one of a hundred civic groups to use the school buildings for their meetings.

A religious test is not required as a condition precedent to any such permitted use. It should not be a bar to such use. No religious test is required to admit a student to the voluntary classes; his parents' consent is enough. Neither religion nor lack of it is a test of admission. Neither his religion nor lack of it should lead this Court to deny to him such benefits as may be incident to the mere use of school property which is shown not to increase the tax burden of those who object to the plan.

To say that religious education may not be taught in a school building, solely because it concerns religion, is really to deny that we are a religious nation. We contend that all constitutional provisions must be read against the background of American history which indicates that this is a religious nation. *So long as all religions are treated alike* it cannot be said that the First Amendment prevents whatever incidental aid the cause of religion receives from government. *The First Amendment deals not with taxes,* qua *taxes, but with religious preferences established by law.*

The Declaration of Independence, the Preamble to the Constitution of the United States, and the Preamble to the Constitution of the State of Illinois, all recognize the

existence of the Deity and express gratitude for His blessings. The Ordinance of 1787, Article 3, provided: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged."

The Federal Constitutional Convention was not anti-religious. As stated by Professor Edwin C. Goddard in "The Law in Its Relation to Religion," (10 Mich. Law Rev. 161, at p. 166):

> "Every one of its members was a believer in God, and in future reward and punishment, and most of them including the presiding officer, Washington, were church members. Of all its members Franklin has been regarded as least orthodox. And yet, during its deliberations, when it seemed impossible to harmonize the varying opinions, Franklin offered his celebrated resolution, in which he moved that 'Henceforth prayers imploring the assistance of heaven and its blessings upon our deliberations be held in this assembly every morning before we proceed to business, and that one or more of the clergy of the city be requested to officiate in that service.'"

This Court declared in *Holy Trinity Church* v. *United States*, 143 U.S. 457, that this is a religious nation and that the Constitution and statutes are to be interpreted upon the supposition that nothing inimical to religion is intended. In *Mormon Church* v. *United States*, 136 U.S. 1, the court held that polygamy was contrary to the spirit of Christianity and of the civilization which Christianity has produced in the western world. The Court clearly indicated that the tenets of religion were part and parcel of American civilization.

We call attention to the discussion of the history of American constitution law in relation to religion in the *Holy Trinity Church* case, and in *Wilkerson* v. *City of Rome*, 152 Ga. 762, 110 S.E. 895, 20 A.L.R. 1334. As there shown, state legislatures and Congress have long

recognized that incidental benefits to religion may be conferred by public authority so long as no advantage is given to any particular sect, denomination or religion. We also refer the Court to *Nichols* v. *School Directors*, 93 Ill. 61 (1879) quoted on page 72, above.

It should be pointed out specifically that it is not our contention that either parents or pupils have the right to *compel* a Board of Education to permit the use of school property for religious education classes. Our point is, where the Board of Education is willing to allow such use, without discrimination, that its permitting such use is no more the furthering of a private purpose than permitting the schools to be used by civic groups. The school authorities cannot be compelled to allow the use of school property by any such groups. If, however, the Board determines that the school buildings may be used for purposes other than school classes and does not unlawfully discriminate against any group, the fact that a class or public meeting has religion for its subject does not automatically exclude it. It is, we submit, as much entitled to be permitted the use of public facilities as is the Parent Teachers' Association or a study club.

This being a taxpayers' action it is obvious that unless the appellant has shown that her tax burden is increased by the use of school premises for religious education classes she has not made a case entitling her to relief on the theory that the tax burden is an unconstitutional one.

This necessity of proving an increase in tax burden is upon the appellant whether the unconstitutionality of the action of the Board of Education is claimed to violate the "establishment of religion clause" of the First Amendment, or of the due process clause of the Fourteenth, as a taking of private property without due process of law—the latter point being the subject discussed here.

Two courts below, without dissent, determined that as a matter of fact the religious education classes did not increase the appellant's tax burden, and this is supported by evidence in the record that no expense was incurred by the School Board for the religious education classes and that the expense of the public would not be lessened by discontinuing the religious education classes (Tr. 69-70; 274-275).

This was a question of fact which can not be decided in a vacuum. The question of fact having been unanimously determined by two courts ought to be accepted by this Court.

Reese v. *Phila. & R. Ry. Co.*, 239 U.S. 463 (1915).
Just v. *Chambers*, 312 U.S. 383, 385 (1941).
Galloway v. *United States*, 319 U.S. 372 (1943).

The appellant argues (Appellant's brief, pp. 20-25), citing the *Everson* case, that whether the expense be "large or small" it is illegal. Apparently concluding that this excuses all proof that her taxes will be increased in some degree, the appellant does not point out any evidence indicating to any degree of certainty that appellant's taxes will be increased except to criticize in general language the holding of the court below, *de minimis non curat lex.*

The use of the school building for general purposes does not cease because of the religious education classes, nor do the teachers stop their work. It appears from the testimony of one of the teachers that teaching in the Champaign schools is not done by the clock; that the teachers are frequently kept busy with special work for students not attending the classes; and that her salary as a teacher is not based on the number of hours she teaches (Tr. 111-117).

The decision by both courts that no appropriation was made from any public fund to aid any sectarian

purpose was reached under a state constitutional provision already quoted * which is as severe as any prohibition which can be spelled out of the First Amendment to the Federal Constitution, unless, as we contend, the meaning of the First Amendment be expanded to include therein matters not originally intended.

An attempt may be made by the appellant or by friends of the Court to argue in disregard of the record that a theoretical expense which can be allocated to the use of school rooms satisfies the appellant's burden of proving that her taxes will be increased by the free use of school property for religious education classes. Any attempt, without evidence to support it, to allocate expense is as fruitless as trying to determine the cost of furnishing a religious institution with general police and fire protection, and of maintaining streets on which those attending the institution may have access to it. By the juggling of figures, it is perhaps true that those costs could be allocated, theoretically, but such computation would no more prove that the taxing power of the Government had been used unconstitutionally then does the theoretical and unsupported claim that the use of school property has increased the appellant's tax burden.

The statement on page 22 of appellant's brief that the constitution of the State of New York is similar to the constitution of Illinois is incorrect on the subject of the use of public property. The constitution of Illinois does not prohibit the use of public property for religious purposes, whereas Article IX, section 4, of the constitution of New York has an express prohibition against the use of any public property, credit or money directly or indirectly in aid or maintenance of any school under the

* Page 93, above.

control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.*

The case of *People ex rel. Lewis* v. *Graves*, 245 N.Y. 195, 156 N.E. 663 (1927), and the *nisi prius* decision and intermediate appellate decision therein (127 Misc. Reports 135; 215 N.Y. Supp. 632; 219 Appellate Division 233; 219 N.Y. Supp. 189), (Appellant's Br., p. 24) arose under the above provision of the New York constitution, which is the reason for the court's emphasis that the released time plan there considered did not involve the use of school property. The cases are authority in our favor for the proposition that the alleged services of the teachers in our case, which consist entirely in handing out and receiving cards from parents, and directing the movement of pupils to and from religious education classes, do not constitute appropriation, payment or donation of public money for a sectarian purpose under a most severe form of constitutional restriction.

The *nisi prius* decision of *Stein* v. *Brown*, 211 N.Y. 822; 125 Misc. 692 (1925), cited on page 23 of appellant's brief,

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* Section 4, Article XI [formerly IX], New York constitution:

> "Neither the state nor any subdivision thereof, *shall use its property* or credit or any public money, or authorize or permit either to be used, *directly or indirectly*, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning." (Italics ours.)

The last three lines, commencing "but" were added promptly (1938) after the decision in *Judd* v. *Board of Education*, 278 N.Y. 200, 15 N.E. 2d. 576 (1938), 118 A.L.R. 789, holding that furnishing transportation to private and parochial schools was prohibited by this section before amendment.

holding that the printing of cards for the use of a committee on Week-Day Religious Education was an unconstitutional appropriation of money is not applicable here because the evidence affirmatively shows that the only mimeographing work ever done in the school office for the Champaign Council of Religious Education was paid for by that Council (Tr. 117-240).

In the very recent California case heretofore cited of *Gordon* v. *Board of Education of Los Angeles,* 78 Cal. App. 2d 498, 178 P. 2d 488, the District Court of Appeals of Los Angeles, on March 10, 1947, denied a mandamus to compel the Board of Education to discontinue the released-time plan in Los Angeles. The school buildings were not used but the expense of preparing, printing or mimeographing and mailing literature and cards was paid by the public school system. Also, teachers and superintendents of schools were directed to keep attendance records and to oversee the working of the plan. The constitutional provisions of California set forth in the opinion prohibited teaching directly or indirectly any sectarian or denominational doctrine in any of the common schools of the State, and prohibited also appropriations or the granting of anything in aid of any religious sect or sectarian purpose. The court held that a released-time plan did not violate the constitutional provisions mentioned and, referring to *Stein* v. *Brown,* 125 Misc. 692, 211 N.Y. S. 822 (1925), cited in the appellant's brief, held that such case was in effect overruled by *People ex rel. Lewis* v. *Graves,* 245 N.Y. 195, 156 N.E. 663 (1927). Incidentally, the court points out, 178 P. 2d 488, 495, that in the *Everson* case this court held that its jurisdiction to strike down state statutes on the ground that monies raised by taxation were expended for a private purpose, must be exercised with the most extreme care.

The evidence in the record, upon which two courts held

in appellees' favor, is clear that no substantial or even measurable expense is incurred by the school board in connection with the religious education classes.

The parents' consent cards are paid for by the religious education teacher (Tr. 117). Only once were such cards mimeographed by the school office and they were completely paid for. (Tr. 240) The registration blanks and schedule cards by which junior high school students elect to take religious education are not printed especially for this course and there is grave doubt in the record even that the words "religious education" appear thereon. (Tr. 117) If the classes were discontinued there would be no change in the form of the schedule card or in the handling of it. (Tr. 241-242) The "services" of the teachers consist only of the handing out and receiving of consent cards and in directing the movement of pupils to and from the religious education classes.

That the items just listed above do not constitute appropriation, payment or donation of public money for a sectarian purpose is shown by *People ex rel. Latimer* v. *Board of Education of City of Chicago*, 394 Ill. 228, 68 N.E. 2d 305 (1946); *People ex rel. Lewis* v. *Graves*, 245 N.Y. 195, 156 N.E. 663 (1927) affirming 127 Misc. Rep. 135, 215 N.Y. Supp. 632, 219 App. Div. 233, 219 N.Y. Supp. 189, and *Gordon* v. *Board of Education of Los Angeles*, 78 Cal. App. 2d. 498, 178 P. 2d. 488 (1947).

The only respect in which the present case differs from the three cases just cited is in the use of the school rooms for the religious education classes. The reason that this is done in Champaign instead of releasing pupils to go to other buildings is due to the traffic hazard which in turn is due to the distance from the schools of other buildings suitable for such classes (Tr. 158, 242).

The record shows without a doubt and without con-

tradictory evidence that no additional expense is incurred by the district because of the use of school rooms for this purpose during the hours that heat, light, and janitor service would be furnished whether or not religious education classes were held (Tr. 237-243).

The trial judges unanimously found as facts (Tr. 69-70):

> "On the issue whether the religious education courses occasion an expenditure of public funds, or an appropriation of public funds, the evidence shows that no direct appropriation of any kind, or a direct expenditure of money of any kind, is made by the defendant school district for or on behalf of said religious education classes. * * *
>
> "Certain rooms of the school building used by the religious classes are lighted, heated, and furnished. Janitor service therein is furnished while the religious education classes are conducted. No charge is made by the defendant to any person or organization on account thereof. The testimony of the defendant shows that the janitor service, salaries, and so forth, would all be the same, whether the religious education courses were conducted or not. For the most part, the expense of light and heat would be about the same whether the courses were conducted or not. The wear and tear on furniture, due to the religious education classes, so far as the evidence in this case shows, would be negligible.
>
> " * * * So that it may be said that no public funds have been directly appropriated by the defendant for private use. But to some slight extent the defendant has indirectly appropriated public funds for the use of these classes, by the furnishing of rooms in public school buildings, light, heat, janitor service, and so forth, as above indicated."

Disregarding the unmeasurable items of indirect expenditure under the doctrine of *de minimis non curat lex*, the issue of fact as to the imposition of any added tax on appellant by the religious education class was resolved against her. Her counsel is driven to the argument in this Court (brief, p. 22) that "no tax in any amount,

large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion," (citing *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1, 16).

We have pointed out in our argument on the meaning of the "establishment of religion" cause of the First Amendment that no law, whether it imposes a tax or not, is invalid under such amendment unless in addition to or as a part of the imposition of the tax, it prefers one religion over another. Furthermore, the test laid down by the Court still requires "a tax". It is still a question of fact whether the appellant's taxes have been or will be increased by the use of school property for the religious education classes. There is nothing intrinsically unbelievable in the testimony of the Superintendent of Schools that such classes do not impose any expense which would not occur in the absence of such classes. If that testimony be true, then no tax burden has been or will be transmitted to the appellant. Since the appellant sues as a taxpayer, it seems clear that even the test of "a tax in any amount, large or small" laid down in the *Everson* case would prevent her from succeeding here.

On page 24 of her brief the appellant quotes the earlier Illinois case of *People ex rel. Ring* v. *Board of Education,* 245 Ill. 334, 340, 92 N.E. 251, previously discussed, for the proposition that, if sectarian instruction is permitted in school buildings, money used in support of the school buildings would be used in aid of a sectarian purpose. This case was decided in 1910, and if the portion quoted sustains the appellant's position now, it must be treated as overruled by the decision of the Supreme Court of Illinois in the present case.

On page 25 of appellant's brief she argues that "if a half hour of sectarian religious education is proper in public schools during school hours, with the assistance of public school teachers, longer periods must be sustained, if adopted." This is not true. If changes in the plan place a financial burden on the public treasury, the courts are still open.

A plan which in one setting would involve no expense, in another setting might involve expense. A plan which consumes 30 minutes a week is different than one which consumes 30 hours a week. The fact that this case may involve a matter of degree is of no importance.*

We submit that unless other features of the Champaign plan of voluntary religious education be found unconstitutional, it is not made so because of any tax burden on the appellant.

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* Mr. Justice Holmes, dissenting opinion, *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218, 223 (1928).

IV.

No "censorship" of religion is involved in this case.

The appellant introduces her discussion of "censorship of religion by administrative action" by a quotation from the opinion of the Trial Court (Tr. 65):

> "Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public school buildings such faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system."

No further reference to the record is made. We think that a fairer statement of the Trial Court's findings is this, also found at page 65 of the transcript:

> "The defendant school district has been willing to grant its permission for the similar, free and equal use of rooms in the school buildings when not in use for school purposes, to any other faith or group which desires to make use of the school rooms belonging to the defendant, for instruction in the tenets of belief or unbelief of such other faith or group."

The Trial Court's findings with reference to this matter were based upon the evidence taken in the cause, a portion of which we set forth below to demonstrate how unsubstantial is the contention of the appellant that any "censorship" has been threatened or exercised by the Board of Education or its agents.

The Superintendent of Schools testified (Tr. 118):

> "I know who teaches religious education in the schools. I do not determine who those teachers are. During the last year or two Miss Chapin told me who was going to teach. I made no objection to her teaching in the school nor have I ever objected to anybody

teaching in the schools. The schools are open to all denominations who want to teach in them."

A moment later, the same witness testified (Tr. 119):

"As far as I know, the class rooms are available to a person who believes in no religion. They are available for the use of political parties during school hours."

On the same transcript page he said (Tr. 119):

"The school buildings are now available to all religious denominations in this community to be used while they are being used by students. I am opening up these buildings to all these people with the permission of the Board of Education. I have not given any thought to whether the schools can furnish sufficient space for all denominations to teach during school hours."

The only thing in the record that even hints at sustaining the contention made by the appellant is found where the superintendent, Mr. Mellon, testified as follows (Tr. 118):

"The Board has the unwritten reservation that the person should be qualified to teach. We would want a qualified person who would know the correct usage of the English language, who would teach in proper English, use good grammar and language; in other words, of the same general type and do the same general type of teaching that a class room teacher would do. I would not consider what religious denomination he belonged to."

We submit that to call these expressions of the Board of Education "censorship" is to do violence to the English language.

What Mr. Mellon obviously meant, taking all of the above excerpts from his testimony together, was that while no restriction whatever had been imposed on the free and equal use of school buildings the Board felt that it was

proper to encourage a teaching standard in the religious education courses equivalent to the teaching standards maintained in the school system.

The appellant does not even contend that this is "censorship" but she apparently bases her claim in that regard upon the following factually erroneous and confusing non-sequitur (Brief, p. 32):

> "If sectarian groups may be permitted to teach in public schools during regular school hours, and as a part of the public school system, the question presents itself as to a censorship controlling either what groups may teach or what they may teach."

This premise is erroneous since the plan is plainly not "a part of the public school system."

Why permitting use of public school buildings by classes in religious education will lead to censorship is left by the appellant wholly to conjecture. Her quotation from *Cantwell* v. *Connecticut*, 310 U.S. 296, at this point in her brief has an extremely obscure connection with anything which either exists in the record or is claimed by appellant to exist there. But it may be inferred that this citation is intended to show a fear on the part of appellant that some sect such, for example, as Jehovah's Witnesses, will be refused permission to use the buildings. This is an wholly unfounded apprehension as will appear from the record itself. With reference to this sect, which appellant's trial attorney (not her attorney in this court) obviously induced to seek permission (during the trial) to use the school buildings, Mr. Mellon said (Tr. 120):

> "Jehovah's Witnesses have used our high school swimming pool for baptismal purposes. They were readily granted that permission and without any rental. No other application to my knowledge has been made by Jehovah's Witnesses for use of property under control of the Board of Education and of course none has been refused."

This is a long cry from the situation that faced the Court in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1939). There a statute required solicitors for religious purposes to seek a certificate of exemption from a state officer. This Court held simply that, where a person had an absolute right to exercise religious freedom, he could not be restrained in such exercise by being required either to procure a license or to procure an administrative determination that his purpose was a religious one in order to obtain an exemption from obtaining a license.

A similar situation existed in *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), and in that case the Court specifically approved *Cox* v. *New Hampshire,* 312 U.S. 569 (1941), and pointedly said at page 110 of the opinion, "nor is there involved here any question as to the validity of a registration system for colporteurs and other solicitors."

In *Cox* v. *New Hampshire,* referred to above, the Court held (p. 576):

> "If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination to time, place and manner in relation to the other proper uses of the street."

In all of these cases, the Court recognized the necessity of permitting the states to impose reasonable regulations upon all persons, regardless of religious affiliation or of the claim on their part that they were exercising their rights of religious freedom, in order to preserve order and to accommodate the use of public property by such persons to similar use by others having equal right to religious freedom.

It may well be that in the case at bar, the Board of Education has an absolute right, in the exercise of its discretion, to prohibit all use of public buildings, but it has

made no claim to do so. At the very most, all that the Board seeks to do is to make certain that the permissive use made will not expose children to instruction on a level of English usage that will interfere with the instruction given in the school curriculum. In making sure that the persons designated to teach the classes are of proper educational qualifications, the School Board through the Superintendent is not "censoring" either the teachers or their teachings but is exercising proper discretion in approving the personal qualifications of the instructors. Indeed, the School Board would be remiss if it were to allow teachers to use the school rooms without any investigation of the moral character and educational qualifications of such teachers.

Again we must refer to the distinction that exists between the acts of the Board of Education and the acts of the voluntary association which has been granted use of the school buildings. No limitation of participation in the activities, even if some were imposed by the latter could possibly constitute a censorship with which the Board could be charged, so long as the Board follows its plan of not compelling all applicants to operate through the Religious Education Council.

CONCLUSION.

This brief is longer than we would ordinarily think proper. We have, nevertheless, felt the necessity of extending it in order to attempt to anticipate and answer whatever contentions may be raised in the briefs of numerous attorneys, who, acting as *amici curiae*, have indicated an intention to file briefs in support of the position of the appellant, but only one of which briefs we

have had the opportunity to examine before completing this brief.

The unusual length of this brief has also been occasioned by the necessity of directing the attention of the Court to highly pertinent interpretative data with which it had apparently not been furnished at the time of the decision of *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, which opinion contains expressions in the majority opinion and language in the dissents which lend encouragement to what we believe to be an erroneous argument as to the establishment of religion clause of the First Amendment. These expressions the appellant now seeks to have this Court enforce as the law of the land.

These factors have resulted in our treating every subject which we believe might be raised by any one, and treating in unusual detail all the historical facts and every circumstance of practical construction or expression of judicial opinion which we felt would cast light upon the true meaning to be assigned to the establishment of religion clause.

We have done this because we cannot know that Your Honors will approve the substantial reasons which we have assigned for disposition of this case upon jurisdictional grounds. Likewise, we cannot know that if jurisdiction is accepted Your Honors will feel obliged to act upon the finding of fact unanimously made by the three trial judges and by the seven judges who reviewed their opinion in the Supreme Court of Illinois.

In the event that the Court accepts jurisdiction of this cause, there will be before this Court the question of determining to what extent, if at all, the States are limited by the establishment of religion clause of the First Amendment in determining their own policies in co-operating with, or aiding and benefiting religion.

It is our respectful suggestion that this is a field heretofore reserved entirely to State power; that subjection of it to Federal control or review will constitute an unnecessary and unwise substitution of national control for state control and that this will tend to mold educational policies into a fixed national pattern which will prevent effective accommodation of the relations between education and religion at the State level where it may be administered in harmony with varying local problems and conditions.

As applied to this particular case, a decision denying to the State the power to confer upon religion even the incidental aid of government will operate to restrict the high right of parents to control the education of their children, which has heretofore been the subject of jealous guardianship by this Court; and finally, that such a decision will necessarily terminate efforts on the State level to provide balancing influences against the increasing emphasis upon materialism and secularism that many sincere persons believe is endangering the very foundations of American life.

In *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, 6, this Court said:

> "It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U.S. 487; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. *Green* v. *Frazier*, 253 U.S. 233, 240. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authori-

ties to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people."

In *Atkin* v. *Kansas*, 191 U.S. 207 (1903) This Court said (p. 224):

> "But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the Courts as embodying the will of the people, unless they are plainly and palpably beyond all question, is violation of the fundamental law of the Constitution."

We respectfully suggest that not only has there been no showing that the action of the State here reviewed is clearly and palpably unconstitutional, but that there has been, in fact, no invasion whatever of any constitutional right to which the appellant may lay claim, and we therefore ask that this Court affirm the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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November 13, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 90

PEOPLE OF THE STATE OF ILLINOIS Ex Rel. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, and ELMER C. BASH and ALICE J. BASH, and WANDA I. BASH, a minor, by ELMER C. BASH, her father and next friend,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

APPELLEES' SUPPLEMENTAL BRIEF

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MAY IT PLEASE THE COURT:

This supplemental brief is filed in response to the invitation of the Court, tendered during oral argument. In tendering this opportunity to appellees, the Court has recognized the serious disadvantage to which the appellees have been put by the Court's granting permission to numerous attorneys to file *amici curiae* briefs following the submission of the appellees' brief. Of course, it will be apparent to the Court that the time intervening between argument of this case and consideration of it by the

Court does not permit appellees sufficient time to attempt a comprehensive treatment of each of these briefs *amici curiae*.

This poses a dilemma to us which involves our either accepting the invitation of the Court, in which case time will permit answering only a portion of the points raised, or permitting the opportunity to pass, in which case the whole of these briefs will go unanswered. We choose the first horn of the dilemma, but owing to the shortness of our time we beg the Court not to treat our failure to deny an argument as an admission of its correctness.

As we are not sure that the Court intended that we should feel at liberty to answer all of the briefs *amici curiae* and are certain only that it was intended that we might answer the two last filed—filed on the very day of the oral argument without our consent—, we will limit the scope of this brief to certain of the points raised in these briefs, namely, that filed by Mr. Kenneth W. Greenawalt on behalf of the American Civil Liberties Union and that filed by Messrs. Homer Cummings and William D. Donnelly as counsel for the General Conference of Seventh Day Adventists.

Preliminary to a discussion of the leading contentions set forth in the briefs *amici curiae* to which this reply is limited, we believe that certain misstatements with reference to the facts, as set forth in the American Civil Liberties Union brief, should be pointed out. On page 3 of the American Civil Liberties Union brief, it is stated that some denominations oppose the plan and transcript references are given. Lest the Court be misled by these references we point out that the churches there mentioned are not located in the school district involved here and so far as the record appears, no adherents of these denominations were resident in the school district.

At page 6 of the same brief, the inference is set forth that "request cards" were mimeographed by the school board and at the expense of the school board. Actually, the record shows (Tr. 240) that such cards were mimeographed only once by the school office and that in such isolated instance, the Religious Education Council promptly and fully paid therefor. Other inferences are contained in the statement of facts in this brief which are misleading. We have not time to answer them. We refer the Court to the agreement in oral argument by counsel for both the appellant and the appellees that the trial court's opinion (Tr. 60-89) sets forth a full, fair and accurate summary of the material facts involved. Please see this statement of facts.

We will now turn to the leading arguments developed in these two briefs *amici curiae*.

I.

Jurisdiction.

Both briefs *amici curiae* show a substantial misunderstanding of the facts relating to jurisdiction. While we do not think that jurisdiction is a proper concern of friends of the court, whose only excuse for being in the litigation is to be helpful to the court in avoiding an incorrect expression of the law in disposing of the case on its merits, we will refer briefly to their treatment of this subject. The brief of the General Conference of Seventh Day Adventists refers to the allegations in the complaint and the answer and the reliance on the First Amendment contained in the complaint. It further refers to the fact that the Supreme Court of Illinois recognized that the appellant relied upon the Fourteenth Amendment and the First Amendment in claiming that the alleged segregation of public school pupils into sectarian groups for the purpose of instruction in a public school violated her rights of religious freedom. It likewise points out that the Supreme Court of Illinois passed upon that question. From these facts, this friend of the court leaps, without aid of references to the record or application of logic, to the unfounded supposition that the appellant relied in the Supreme Court of Illinois upon the establishment of religion clause of the First Amendment and that the court passed upon such right. This was, of course, not the case, for the establishment of religion clause of the First Amendment was neither referred to in the errors relied upon in the Supreme Court of Illinois (see Appellees' Brief, p. 2), nor was any argument made in that court with reference thereto and, *a fortiori,* no decision was made thereon.

Counsel for American Civil Liberties Union falls into the same error on page 3 of his brief, when he states

loosely that the First and Fourteenth Amendments of the United States Constitution and "the principle of separation of church and state" were passed upon "by the Illinois courts." It is, of course, not a question of what the trial court passed upon, nor is it a question of whether the First or Fourteenth Amendment was mentioned in the Supreme Court of Illinois, but it is a question of whether or not the establishment of religion clause of the First Amendment was relied upon there, argued there, and passed upon there. We have elsewhere fully treated this subject (Appellees' Brief, p. 2 *et seq.*) and we do not believe that the Court will be misled by the inexact and gratuitous arguments of counsel who are not familiar with the proceedings heretofore had in this case.

II.

Secularization of the public schools is not a requirement of the Federal Constitution.

Running through the entire brief of American Civil Liberties Union is a fundamental misconception of the extent to which public schools throughout the several states are secularized and the cause therefor. This brief first of all assumes that public schools are wholly secular. This, however, flies in the face of the fact that, as pointed out in our original brief and as demonstrated by a government publication based on a survey, thirty-six states either permit or require Bible reading in the public schools (Appellees' Brief, p. 118). Further, it may be safely said that in no state is all reference to religion or the existence of a supreme being excised from the school program.

Nevertheless, religious education as such and, of course, organized worship are quite generally omitted from the public school program. As pointed out in the brief of American Civil Liberties Union (p. 12), our public school

is a relatively recent development dating from about 1840. Prior to that time almost all education was conducted either by church schools or private schools. Progressively during the nineteenth century religious emphasis was eliminated from the public school as a result of the practical situation which faced school administrators as the heterogeneity of our population increased. The increasing diversity of population and consequent diversity of religious beliefs in local communities, of course, made it progressively more difficult to include religious services in which all could conscientiously participate.

This practical situation has produced the public school as it exists today. During the one hundred and seven years that have intervened since Horace Mann founded the public school movement, no appeal has ever been made until now to the Federal Constitution or to the Federal courts either to bring about secularization of the public school or to prevent such religious education therein as may be permitted by state law.

Had the First and Fourteenth Amendments been the instruments of accomplishing the secularization of the public schools, and adequate to that purpose, there would have been no occasion for the political battle of 1876 referred to in our original brief (pp. 102-104).

It is a strange feat of logic indeed which starts with the historic fact that the public school was secularized by the pressure of public opinion motivated by practical considerations of public policy (see American Civil Liberties Union brief, p. 12), without any appeal whatever to the Federal Constitution, and concludes therefrom that the Constitution is to be interpreted to require such secularization.

An extension of this illogical assumption leads avid secularists to appeal to the Federal Constitution for the maintenance of a *status quo* which was achieved in this

instance by political processes without resort to the Federal Constitution. In fact, some persons believe so strongly in the wisdom of complete secularization of public education that they assume that somewhere in the Federal Constitution will be found prohibitions of all other forms of public education.

Protagonists of the *status quo* are wont to look first to the law for protection anl are quick to believe that somewhere in the Constitution there must be a provision which will protect them against having to defend at the bar of public opinion the wisdom of their position. Judges, too, sometimes are victims of the error of thinking that everything which they believe to be good or right is to be found crystalized in constitutional provisions, provided the framers' intention and the voters' understanding of them at the time of their adoption are not assigned too much weight in interpreting such constitutional provisions. We are all justly proud of Gladstone's recognition of our Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man", but there is no implication in that, nor in any judicial interpretation of the Constitution, which warrants the supposition that every ideology which may be supposed to be good is to be found in the Constitution. Many good institutions and many great advances toward building a democratic way of life on this continent have been engineered, built upon, and moved toward perfection without constitutional initiation, direction or compulsion. It will always be so.

Secularization of the public school may in the minds of many be a very good and high purpose but it did not find its genesis in the Constitution of the United States and, properly, it cannot be cemented into our institutions by an appeal to the Constitution. To do so is to remove the question of the wisdom of secularization of the public

schools from public discussion and debate. Secularization of the public schools has reached its present stage by free public discussion and by the normal functions of democratic processes and there is no warrant in the Constitution for now preventing those same democratic processes from modifying the nature and extent of such secularization.

III.

The Federal Constitution does not protect taxpayers against the use by the states of tax monies for the teaching of opinions with which the taxpayer disagrees.

The briefs of the American Civil Liberties Union (pp. 24-27) and of the General Conference of Seventh Day Adventists (pp. 19-26) contend that the First Amendment of the Federal Constitution prevents the use of state monies for the promotion of opinions with which the taxpayer disagrees. To the extent that this argument is bottomed upon the establishment of religion clause of the First Amendment, it is, we submit, completely answered by the discussion of that clause in our brief (pp. 44-100).

To the extent that this position is bottomed upon the "freedom of religion" clause of the First Amendment, no authority is cited therefor except references to the preamble of the Virginia Bill for Establishing Religious Freedom and a quotation from the Memorial and Remonstrance of James Madison.

The preamble to the Virginia Bill is quoted as follows:

> "To compel a man to contribute money for the propagation of opinions which he disbelieves is sinful and tyrannical."

Entirely aside from the consideration that this was not a substantive part of the Bill and that the Bill is no part of the Constitution of the United States, the quotation is

forcibly lifted from its context and as thus standing alone does not do Mr. Jefferson justice. It is perfectly absurd to say that the Federal Constitution is to be given any such meaning. Ideas grow too fertilely in the soil of American democracy to suggest that upon all ideas which are the permissible subject of governmental dissemination, taxpayers must think with utter uniformity. Certainly public opinion is sharply divided upon a multitude of ideas which are taught in the public school curriculum, many instances of which will occur to the Court as readily as to ourselves, in the various fields of the social sciences and even in the more exact sciences such as mathematics, chemistry and physics. In all of these, long-established "truths" are exploded in the day to day evolution of these subjects of human study and knowledge. Indeed, the only growth in human knowledge is the direct result of differing ideas, explosion of old ideas and creation of new ones.

Of course, no distinction is tenable between ideas in the field of religion and other vast reaches of human thought. As this Court has repeatedly recognized and most recently in *United States* v. *Ballard*, 322 U.S. 78 (1944) p. 86:

> "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *West Virginia State Bd. of Edu.* v. *Barnette*, 319 U.S. 624. It embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths".

Also in *Cantwell* v. *Connecticut*, 310 U.S. 296, 307, (1939) this Court recognized that the mere determination by government of what ideas are religious ones and what are unreligious ones is itself a violation of the constitutional right of citizens to freedom of religion. The language of the court in this instance was:

> "But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license,

the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay forbidden burden upon the exercise of liberty protected by the Constitution."

If some person came to the conclusion that the science of mathematics was put to so many materialistic purposes that it was itself irreligious and that its study and propagation violated his conscientious scruples, this Court would undoubtedly hold that he had an absolute right to hold his opinion on the subject, but it certainly would not, because of his conscientious scruples, prohibit the expenditure of public monies for the teaching of mathematics.

An equally valid analogy and perhaps a more apparent possibility is that a militant Christian Scientist might appeal to this Court for protection of a belief that the practice of medicine was a mistaken, wrongful and irreligious intrusion into the field of divine healing. If so, we would implicitly trust this Court to protect that belief, but we as quickly assume that this Court would not on account of such belief either exempt the Christian Scientist from paying taxes, a portion of which are applied to the maintenance and support of medical schools, or abolish the medical schools.

The language of Mr. Justice Cardozo (Mr. Justice Brandeis and Mr. Justice Stone joining) in *Hamilton* v. *Board of Regents of the University of California*, 293 U.S. 245 (1934) is highly relevant and, if applied, is controlling here. That case involved the claim of conscientious objectors that they were entitled to enter the University of California without taking military training. This Court rejected such claim. In a separate concurring opinion, the justices mentioned above called attention, among other things, to the fact that (p. 266) from the beginnings of history "Quakers and other conscientious objectors have been exempted as a matter of grace from military service,

but the exemption, when granted, has been coupled with a condition, at least in many instances, that they supply the Army with a substitute or with the money necessary to hire one."

The separate concurrence continued (pp. 267-268):

> "For one opposed to force, the affront to conscience must be greater in furnishing men and money wherewith to wage a pending contest than in studying military science without the duty or pledge of service. Never in our history has the notion been accepted, or even, it is believed, advanced, that acts thus indirectly related to service in the camp or field are so tied to the practice of religion as to be exempt, in law or in morals, from regulation by the state. On the contrary, the very lawmakers who were willing to give release from warlike acts had no thought that they were doing anything inconsistent with the moral claims of an objector, still less with his constitutional immunities, in coupling the exemption with these collateral conditions.
>
> "Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. *The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense; or in furtherance of any other end condemned by his conscience as irreligious or immoral.* The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law." (Italics supplied.)

It is clear that since the Constitution does not excuse payment of taxes for recruiting and other propagation of ideas favorable to military service and does not excuse the payment of taxes for the very consummation of waging war against which the taxpayer has strong religious scruples, the Constitution does not protect a taxpayer against the teaching at public expense of ideas with which

he, the taxpayer, happens not to agree—whether on religious or on other grounds.

Reference is made (brief, General Conference of Seventh Day Adventists, p. 23) to the "three pence" sentence contained in Madison's Memorial and Remonstrance. Here again the language quoted is wrested from its context. The quotation given is as follows:

> "Who does not see * * * That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

What Madison was here complaining of was not the expenditure of three pence for the equal and non-discriminatory promotion of religion, but he was complaining that if an exaction could be made for the support of the Christion religion, as distinguished from all other religions, then the same power could establish as the preferred monopolistic religion of a state or nation a particular sect of the Christian religion. What Madison was contending for was equality of treatment of religions, and his objection to the expenditure of "three pence" was not that such an expenditure in aid of religion generally was improper but that it was improper to expend it for the establishment of one religion, even though that religion be the Christian religion. We have more fully treated this subject in our original brief (p. 28 *et seq.*).

The problem before this Court is one of interpretation of the Constitution of the United States and not of the preamble to the Bill for Establishing Religious Freedom in the State of Virginia, or of Madison's Memorial and Remonstrance. We suggest that the expression of Justices Cardozo, Brandeis and Stone, above set forth, furnishes a more authoritative guide than either of these. Furthermore, we submit that neither of the documents mentioned

contains any rule of judicial decision which supports any pronouncement that a taxpayer may enjoin the use of public monies for the teaching of ideas with which such taxpayer disagrees.

IV.

The Champaign Religious Education Council is not an agent or instrumentality of the Board of Education or of the State of Illinois.

The brief of the General Conference of Seventh Day Adventists demonstrates a fundamental misunderstanding of the record in this case. This misunderstanding is set forth at page 19 of the brief where it is stated, "The Council of Religious Education has been given general control over the teaching of religion in the schools * * *."

This misstatement is based upon the unfounded assumption that the Board of Education has granted the *exclusive* use of its school rooms to the Council. It further assumes that the Board of Education has not and will not grant similar free and equal use of its facilities to other religious organizations or groups. There is, of course, no support whatever in the record for this conclusion.

The superintendent of schools, as the executive officer of the appellant, testified as follows (Tr. 119):

> "The school buildings are now available to all religious denominations in this community to be used while they are being used by students. I am opening up these buildings to all these people with the permission of the board of education".

Again, he repeated (Tr. 118):

> "The schools are open to all denominations who want to teach in them".

Again, he said (Tr. 118):

> "The schools are available to Christian Scientists if they want to conduct the class. It would not be

practical for them to teach in the same room at the same time as Miss Chapin teaches. It would be done in another room."

Again, on the same page he said:

"The class room is available to people who teach religion to the effect that saluting the flag is wrong, but they have never asked for it."

Again, he testified (Tr. 120):

"Jehovah's Witnesses have used our high school swimming pool for baptismal purposes. They were readily granted that permission and without any rental. No other application to my knowledge has been made by Jehovah's Witnesses for use of the property under the control of the board of education and of course none has been refused".

The circumstance that all faiths which desire to make use of school rooms for the purpose of teaching religious education have grouped themselves together in perfect amity and cheerful cooperation, and the fact that no other group has sought such use certainly does not make of the Council an agency or instrumentality of the State.

Of course, the authorities referred to by the General Conference of Seventh Day Adventists' brief have no application here. These cases involved, situations where the citizen by statutes of the state, in order to exercise his constitutionally protected right of franchise, (specifically his right to have a voice in choosing candidates), was required to seek and obtain membership in a political party. This Court quite properly held that such a political party was not private in character, but became, by reason of its recognition by the State, and because it was an exclusive conduit for exercise of constitutional rights, an instrumentality of the State. The record in this case presents no comparable state of facts.

In *United States* v. *Classic*, 313 U.S. 299, (1941) the Court said of a political party, (p. 326):

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken, 'under color of' state law."

This quotation apparently contains the pith of the language for which this and other similar cases are cited in this brief *amicus curiae*. But we submit that there is nothing whatever in our record to warrant here an application of this rule of decision.

Because the Council has not been given any exclusive power, it is quite irrelevant that the Council of Religious Education has not excluded or threatened to exclude any sect from participation in the Council. Nevertheless, a portion of the testimony of the president of the Council, read to this Court during the oral argument, will dispose of any contention that any sect has been excluded (Tr. 159):

> "I stated that not all denominations or religious beliefs are represented in the council. All are free to participate and we are anxious to have them. No religious denomination or recognized church or belief has ever sought membership or participation in that council whose membership has not been freely accepted. All denominations that we knew about in the community were invited to participate. Letters were sent to all that we could find and personal calls were made."

Of course, the contention that censorship of religion has been indulged in by the Council of Religious Education is too insubstantial to merit extended discussion. No transcript references are given to support it, and the real truth is that the act of the cooperating religious groups in appointing committees to examine personnel and curriculum to eliminate anything prejudicial to or intolerant of any of the groups was wholly voluntary. This was the action of the Council and binding on no one except those who voluntarily chose to participate as part of the Council. The

Court will recognize that censorship involves the use of government authority, and that the Bill of Rights as well as the Fourteenth Amendment are prohibitions against governmental action and do not operate against private individuals or organizations. For this we refer the Court to *Nixon* v. *Condon*, 286 U.S. 73 (1932), at p. 83.

CONCLUSION.

We respectfully suggest to the Court that while some organizations, religious as well as unreligious, have seen fit to interpose their objections here, by *amici curiae* briefs, to the use of public school buildings for religious education classes, this opposition should not be taken by the Court as evidence that there is no strong religious support for our cause. Because we have been confident that this Court would not be stampeded by the force of numbers either for or against such use of public buildings and because we felt that briefs *amici curiae* could only result—as they have—in misconstruction of the record and confusion of the issues, we have steadfastly refused to give our consent or encouragement to the filing of briefs either for or against our position. While those friendly to our position have generally respected our wishes, those opposing it have, of course, not felt bound to do so.

We respectfully suggest to the Court that the contentions made in these briefs *amici curiae* are largely, if not wholly, inapplicable to the record in this case, and that a consideration of the appellant's briefs and our own will best present the relevant issues involved, including the question of jurisdiction which we deem to be controlling.

We further respectfully suggest that the fact that some of these briefs have been filed by religious organizations does not indicate that our position is constitutionally

wrong. Majorities are not to be deemed wrong because minorities exist. Nor are laws unconstitutional because all may not choose to avail themselves of their provisions.

Equality of *opportunity*, not equality of *result*, is what the law guarantees. The fact that the religious groups having more numerous adherents will perhaps use the equal opportunity more often or to better advantage than small sects is *no* concern of the Federal Constitution or of the courts.

We respectfully suggest, also, that to the extent that this case is considered on the merits, its most sobering aspect is the overshadowing right of religious-minded parents to direct, control and promote the education of their children in a manner which will afford them opportunity to develop an interest in and an expression of spiritual values on the same plane with secular and materialistic values. It is our position that the Released Time Week-Day Religious Education plan in practice in Champaign, Illinois, gives an opportunity for the expression of this high parental right without any dimunition or impairment of the similar right of the appellant.

Equality is the very touchstone—the *sine qua non* of democracy. To interpret the Federal Constitution to prohibit the use of public school buildings because the classes are religious in nature is to defeat such equality and is to defeat it on religious grounds. Such an interpretation commits religion in every form of its expression to a state of anarchy. Such interpretation destroys the intended and essential symmetry of our political institutions, leaving government to promote, foster, and build every unreligious or irreligious institutional activity but committing religion to a legal vacuum, a reasonless void, and this simply because it is religion.

We suggest to the Court that it is one thing to say

that government may not, by preferment of one religion over another, exercise control over religion or permit religion to exercise control over government, but that it is quite another thing to say that religion and government may not cooperate one with the other or receive the inestimable benefits which each may give to the other.

If such a philosophy is now to become a part of our constitutional law, the report referred to on page 3 of the brief of the General Conference of Seventh Day Adventists, of the President's Committee on Civil Rights and entitled "To Secure These Rights" (1947), becomes a very inaccurate expression, indeed, of "The Ideal of Freedom and Equality", under which heading the following appears (p. 4):

> "The central theme in our American heritage is the importance of the individual person. From the earliest moment of our history we have believed that every human being has an essential dignity and integrity which must be respected and safeguarded. Moreover, we believe that the welfare of the individual is the final goal of group life. Our American heritage further teaches that to be secure in the rights he wishes for himself, each man must be willing to respect the rights of other men. This is the conscious recognition of a basic moral principle: all men are created equal as well as free. Stemming from this principle is the obligation to build social institutions that will guarantee equality of opportunity to all men. Without this equality freedom becomes an illusion. Thus the only aristocracy that is consistent with the free way of life is an aristocracy of talent and achievement. The grounds on which our society accords respect, influence or reward to each of its citizens must be limited to the quality of his personal character and of his social contribution.
>
> "This concept of equality which is so vital a part of the American heritage knows no kinship with notions of human uniformity or regimentation. We abhor the totalitarian arrogance which makes one man say that he will respect another man as his equal only if

he has '*my* race, *my* religion, *my* political views, *my* social position.' In our land men are equal, but they are free to be different. From these very differences among our people has come the great human and national strength of America.

"Thus, the aspirations and achievements of each member of our society are to be limited only by the skills and energies he brings to the opportunities equally offered to all Americans. We can tolerate no restrictions upon the individual which depend upon irrelevant factors such as his race, his color, his religion or the social position to which he is born."

Finally, we commit this case to the judgment of the highest court of our land with a firm conviction that the members of the Court have a full understanding of both the jurisdictional and constitutional questions before the Court, and with full confidence that nothing but the most positive evidence of unconstitutionality of an activity widely practiced and closely supervised by the people will be allowed to strike down such activity as unconstitutional.

We submit that freedom of thought and of religion will be best secured by affirming the judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

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December 11, 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1947

PEOPLE OF THE STATE OF ILLINOIS
ex rel. VASHTI MCCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, and ELMER C. BASH and ALICE J. BASH, and WANDA I. BASH, a minor, by ELMER C. BASH, her father and next friend,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF OF AMICI CURIAE AND MOTION

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IN THE

Supreme Court of the United States

OCTOBER TERM 1947

No. 90.

PEOPLE OF THE STATE OF ILLINOIS
ex rel. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, and ELMER C. BASH and ALICE J. BASH, and WANDA I. BASH, a minor, by ELMER C. BASH, her father and next friend,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The undersigned, as counsel for the Synagogue Council of America and the National Community Relations Advisory Council and on their behalf and on behalf of the organizations affiliated with them, respectfully moves this Court for leave to file the accompanying brief as Amici Curiae.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three

divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Rabbinical Council of America, representing the Orthodox rabbinate;
Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;
Rabbinical Assembly of America, representing the Conservative rabbinate;
United Synagogue of America, representing the Conservative congregations;
Central Conference of American Rabbis, representing the Reform rabbinate;
Union of American Hebrew Congregations, representing the Reform congregations.

The National Community Relations Advisory Council is a co-ordinating body consisting of the following national and local lay Jewish organizations concerned with American Jewish community relations:

American Jewish Committee
American Jewish Congress
B'nai B'rith (Anti-Defamation League)
Jewish Labor Committee
Jewish War Veterans of the United States
Union of American Hebrew Congregations
Akron Jewish Community Council
Jewish Public Relations Council for Alameda and Contra Costa Counties, California
Baltimore Jewish Council
Jewish Community Council of Metropolitan Boston
Jewish Community Council, Bridgeport, Conn.
Brooklyn Jewish Community Council
Cincinnati Jewish Community Council
Jewish Community Council, Cleveland, Ohio
Detroit Jewish Community Council
Jewish Community Council of Essex County, New Jersey
Indiana Jewish Community Relations Council
Public Relations Council of the Jewish Federation of Indianapolis
Community Relations Bureau of the Jewish Federation and Council of Greater Kansas City
Los Angeles Jewish Community Committee

Milwaukee Jewish Council
Minnesota Jewish Council
New Haven Jewish Community Council
Philadelphia Jewish Community Relations Council
Jewish Community Relations Council, Pittsburgh
Jewish Community Council, Rochester
Jewish Community Relations Council of St. Louis
Jewish Survey and B'nai B'rith Community Committee of San Francisco
Southwestern Jewish Community Relations Council
Jewish Community Council of Springfield, Mass.

The organizations affiliated with the Synagogue Council of America and the National Community Relations Advisory Council include in their membership more than eighty percent of Americans affiliated with Jewish organizations. We believe, therefore, that in submitting this brief we speak for American Jewry.

The issue presented to this Court in this case is the constitutional validity of a system under which sectarian religious instruction is conducted within public school buildings during regular school hours. At the beginning of our brief we set forth the importance of the issue to American Jewry. Here we state only that this is the first instance in which practically all American Jewish organizations, religious and lay, have joined in submitting a brief.

We have sought, but have been unable to obtain, the consent of counsel for the parties to the filing of this brief.

Dated: New York, N. Y., October 24, 1947.

HENRY EPSTEIN,
Attorney for
SYNAGOGUE COUNCIL OF AMERICA
and
NATIONAL COMMUNITY RELATIONS
ADVISORY COUNCIL.

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF OF AMICI CURIAE

Interest of the Amici

This brief is presented on behalf of the Synagogue Council of America and The National Community Relations Advisory Council, comprised of the organizations listed in the foregoing motion.

There are many reasons why we are gravely concerned with the issues in this case. We regard the principle of separation of church and state as one of the foundations of American democracy. Both political liberty and free-

dom of religious worship and belief, we are firmly convinced, can remain inviolate only when there exists no intrusion of secular authority in religious affairs or of religious authority in secular affairs. As Americans and as spokesmen for religious bodies, lay and clerical, we therefore deem any breach in the wall separating church and state as jeopardizing the political and religious freedoms that wall was intended to protect. We believe, further, that our public school system is one of the most precious products of our American democracy. We are, therefore, impelled to voice our opposition whenever attempts are made to compromise its integrity. The divisiveness which inevitably results whenever sectarianism enters the public school affects all American children, but is particularly harmful to children of minority faiths.[1] Jewish groups

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[1] Attempts to invoke the power of the state in support of religion have invariably brought religious conflict and sectarian strife in their wake. As early as 1785 Madison declared that the "very appearance of the [Assessment] Bill has transformed that 'Christian forbearance, love and charity' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased." Madison's *Memorial and Remonstrance Against Religious Assessments*, par. 11, annexed as appendix to *Everson* v. *Board of Education of the Township of Ewing*, 330 U. S. 1 (1947). The purpose of the Bill was to establish the Christian religion in Virginia by supporting religious teachers through tax raised funds.

For indications of Protestant-Catholic tensions engendered by demands that parochial schools share in federal funds proposed for public schools, see: Oxnam, *Federal Funds and Parochial Education*, The Churchman (March 1, 1947) 13; *Federal Aid to Sectarian Education*, Federal Council of Churches of Christ in America (April, 1947); *Hearings before Senate Committee on Education and Labor on S. 717 and S. 181*, 79th Cong., 1st Sess. (1945) 914-931; *Hearings before House Committee on Education and Labor on Federal Aid to Education*, 80th Cong., 1st Sess. (1947) 300-357, 423-427. The decision of this Court in the *Everson* case has itself evoked considerable inter-religious animosity. See, e.g., Editorial, *The Protestants Get a Licking*, The Churchman (March 1, 1947) 4; Editorial, Commonweal, March 14, 1947; N. Y. Times, Feb. 12, 1947, p. 27; *id.* June 12, 1947, p. 1; *id.* June 16, 1947, p. 8. Recently, the incorporation of a Catholic school into the public school system at North College Hill, a suburb of Cincinnati, resulted in riots, bloodshed and intra-communal hatred.

base their opposition to the released time program on many grounds, but no consideration bulks larger in that opposition than the divisive effects of the program.[2] Thoughtful Christians are no less concerned with this harmful aspect of released time.[3]

In an editorial the magazine *Frontiers of Democracy* accurately described the results of the introduction of sectarianism into the public schools:[4]

> It will subject children of minority groups to grave injustices. * * * The obvious attention to religious differences which religious instruction will promote cannot fail to fan the flames of intolerance in every community where a religious minority exists. In overwhelmingly Protestant communities the finger of deviation will point to the Catholic. In Catholic populations the child of Protestant parents will creep unwillingly to his religious teacher. It needs no psycholo-

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Fey, *Preview of a Divided America*, Christian Century. (May 28, 1947) 682-684; Fey, *They Stand For Free Schools*, Christian Century (July 2, 1947) 824; Cincinnati Post, July 17, 1947, p. 1.

When introduction of the released time program was first proposed in New York City in 1917 riots actually broke out. Howlett, *Released Time for Religious Education in New York City*, Religious Education (March-April 1942) 104-108.

[2] See, Editorial, *Public School Time for Religious Education*, Jewish Education (January, 1941) 130-132.

[3] An eminent Protestant observer remarks: "When procedure to line up the youngsters for their 'religion' classes segregates Americans as Catholics, Lutherans, other Protestants, Jews, cultists, smaller sects, non-churchgoing pupils, a consciousness of religious cleavage is inevitable and it is baneful. * * * The religious disunity of the proponents of dismissed time plans is one of the principal arguments against released time. Released time not only divides public school students into four major groups, Catholics, Protestants, Jews and the majority or minority that remains behind in the classrooms, but it also breaks up Protestant against fundamentalist Protestant, cultist against sectarian enthusiast, Lutheran against Baptist. When weekday church school sessions are held in schoolrooms, they often become catechism against catechism." Moehlman, SCHOOL AND CHURCH: THE AMERICAN WAY (3rd ed. 1944).

[4] December 15, 1940, p. 72.

> gist to tell what disastrous harm will be done; the more sensitive parents are to the facts of child development, the more serious will their problem become. * * * It [the association of religious instruction with public education] will divide sections of a community, set family against family, foment friction within families where parents are of differing faith, and sow discord within the normal relationships children create in their neighborhood.

The division of public school children according to their religious beliefs is by no means the only unfortunate consequence of this encroachment of sectarianism upon the public schools. Equally harmful are some of the teachings in the released time classes, particularly when they are given the sanction and authority of the school system. The stigmatizing effect of teaching Jewish participation in the crucifixion has been acknowledged by many students of the subject.[5] Such teaching was included in the religious education classes in Champaign (R. 95-98). This Court can readily imagine the effect of such teachings in the presence of his public school teacher upon the relationship between a Jewish boy and his Christian classmate.

Champaign is not unique in this respect. There is ample evidence that the teachings in religious courses foster antagonisms between Christians and Jews, between Protestants and Catholics and even among various Protestant sects.[6]

We do not suggest that the state exercise any control over the content of religious instruction in church schools.

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[5] Valentin, ANTI-SEMITISM (1936) 13-14; Brown, *The Origin of the Anti-Semitic Attitude* in JEWS IN A GENTILE WORLD (1942) 134-135; Freeman, *The Motivation of Jew-Gentile Relationships*, *id.* at 165; Clinchy, *Borderline of Prejudice*, Christian Century (May 14, 1930) 623-627.

[6] Beckes, *Weekday Religious Instruction: Help or Hindrance to Inter-Religious Understanding*, National Conference of Christians and Jews, Human Relations Pamphlet No. 6 (1946) 8, 13-16; Public Education Association, *Released Time for Religious Education in New York City Schools* (1943) 13; *id.* (1945) 14; Oxnam, *supra* note 1, at 14.

If the effects of some of this instruction are productive of frictions the problem is one for religious authorities and educators, and not the state. This is part of the price we pay for religious liberty and we would not have it otherwise. But when these teachings are brought into the public school system they are given the authoritative sanction of that system. The inevitable effect is to bring about the very evil which those who framed the amendment guaranteeing religious liberty strove above all else to avoid.[7]

For these and other reasons we have consistently opposed the encroachment of religious instruction or worship on the field of public education. We are fully aware of and greatly respect the depth of conviction and sincerity motivating those who seek to invoke the aid of the public school system in meeting the problem of religious illiteracy. The crucial issues involved and consistent adherence to the principles to which we subscribe, however, compel us to submit this brief.

Our opposition to religious instruction within the public school must in no way be interpreted as hostility to religious instruction as such. In Jewish history and tradition religious instruction has always been regarded as a most sacred responsibility. The overwhelming majority of Jewish children voluntarily attend after-hour and Sunday schools conducted by the local Jewish communities where they receive their religious education wholly independent of

[7] "The great danger, however, in giving time off during school hours for religious instruction is not merely that there would be too great a loss of time from secular education but that there would be a temptation for ambitious ecclesiastics of every kind to propagate under the protection of public school auspices their own peculiar notions of religious training, that there would be a possible conflict among the children themselves in prying into each other's religious affiliations, that the door would be opened to every form of intolerance and bigotry that has plagued mankind under the guise of religion—potential dangers that must not threaten our public school system." Johnson, LEGAL STATUS OF CHURCH-STATE RELATIONSHIPS IN THE UNITED STATES (1934) 129-130.

the public school system.[8] We believe that the responsibility for religious education may not and should not be shared by the public school system. American Jewry are not prepared to concede the spiritual insolvency implicit in such a division of responsibility.[9]

We wish to make clear our regret that the appellant chose to use this case as a medium for the dissemination of her atheistic beliefs and injected into the record the irreligious statements it contains. We wish not only to dissociate ourselves completely from the anti-religious views of the appellant, but wish also to deplore the fact that the sponsors of the original petition chose this case as a means of inscribing such anti-religious matter on the public record and for confusing the basic issue in this case by dragging into it the unrelated issues of atheism versus religion.

But because we believe that the issue in this case is of paramount importance to Jews, we have overcome our natural reluctance to join in a case the record of which is replete with anti-religious matter. We feel that a failure on our part to do our utmost to persuade this Court that the decisions of the courts below must be reversed would

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[8] It is estimated that three out of every four Jewish children in the United States receive religious instruction at some time or another. Jewish Education Association of New York, *Twenty-Five Years of Jewish Education in the U. S.*, American Jewish Year Book (1936-1937) 104; Hurwich, *Religious Education and the Release Time Plan*, Jewish Education (1941) 103-107.

[9] See Madison's *Remonstrance*, *supra* note 1, at par. 6:

> It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

See also Williamson, *Religion and the Public Schools*, The Churchman (August, 1947) 10:

> The only construction that can be placed upon Protestant advocacy of sectarianism in public school education is an admis-

be an inexcusable dereliction in our duty to American Jewry. We would have preferred to have the issue presented to the Court shorn of any anti-religious irrelevancies. We are aware that men of ill-will and even many unthinking persons may distort our defense of the appellant's right to have her child attend a public school in which he is free from religious indoctrination of any kind and from any compulsion to attend religious instruction therein into a defense of her atheistic dogmas. But the issue is before the Court in this case and the choice of how best to present it to the Court is not ours. The importance of the issue to Jews not only in terms of its freedom of worship but also in terms of its defense of our democratic system overrides all other considerations and compels our intercession regardless of the risk of unjust defamation.

Statement of the Case

The appellant, Vashti McCollum, resident and taxpayer of Champaign School District No. 71, Illinois, and mother of a ten-year-old child attending a public school in that district, brought suit in the Circuit Court of Champaign County for a writ of mandamus directing appellees, the District Board of Education, to prohibit religious instruction within the public schools of the district (R. 1, 17). After trial the Circuit Court rendered judgment denying the petition (R. 89). The Supreme Court of Illinois affirmed (R. 280) and allowed appeal to this Court (R. 283), which, on June 2, 1947, noted probable jurisdiction (R. 285).

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sion of weakness. Are Protestant parents unable to lead their children toward religion in their own homes? And what of the churches? If Sunday school attendance has fallen off to an alarming extent, what is the reason for it? Why can we not emulate our Jewish friends, many of whose children receive intensive religious instruction after school hours? Finally, have we so little faith in the American way of life, that we would willingly lend ourselves to practices that tend to undermine it?

Statement of Facts

The "released time" plan for weekday religious instruction[10] had its origin in Gary, Indiana, in 1913 when the then Superintendent of Schools directed the dismissal of children an hour earlier one day of each week to enable them to pursue their individual interests such as religion, music or art. Church leaders took advantage of this plan to establish classes in religious instruction during that hour and sought to induce attendance at these classes by the dismissed children. Later, other communities undertook similar programs, but on the urging of church leaders, the school authorities dismissed only those children who indicated their intention to attend classes in religious education. The next step in the development of the "released time" plan was the practice of releasing children in the middle of the school day, rather than, as formerly, at the end of the day. The instant case illustrates still another step in the consistently growing encroachment of the released time plan on the public school system—the bringing of religious instruction into the public school classroom during regular school hours.[11]

Religious instruction was instituted in Champaign in the fall of 1940 under a "released time" plan sponsored by the

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[10] The term is referred to at R. 187, 188, 190.

[11] Although only twelve states (California, Indiana, Iowa, Maine, Kentucky, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, South Dakota and West Virginia) have statutes permitting release of public school children for religious instruction, there is evidence that the plan is in operation in varying degrees in several other states.

There is no agreement as to the number of public school children enrolled in "released time" classes, estimates varying from one to two and a half million. Davis, *Weekday Classes in Religious Education*, U. S. Office of Education (Bulletin 1941, No. 3) 24; National Education Association, *The State and Sectarian Education*, Research Bulletin (Feb., 1946) 36; Shaver, *The Movement for Weekday Religious Education*, Religious Education (Jan.-Feb., 1946). There were 24,562,473 pupils enrolled in American public schools in 1942, the last year for which figures are available. STATISTICAL ABSTRACT OF THE UNITED STATES, U. S. Dept. of Commerce (1946) 130.

Champaign Council on Religious Education, an interfaith committee, then composed of representatives of some of the local Protestant, Catholic and Jewish religious groups.[12] This plan was modeled upon the principles sponsored by the International Council of Religious Education[13] (R. 160), with, however, one fundamental difference: the religious instruction classes were conducted *within* the public school building,[14] whereas the International Council advises against this practice.[15]

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[12] The record does not indicate to what extent Catholic and Jewish religious bodies were represented on the Champaign Council. In view of the opposition to released time of American Jewry and the non-participation of Jewish groups in the Champaign program in the last two years, it is probable that Jewish representation was not large or significant. The record does establish that among the Protestant groups, only Methodists, Presbyterians, Episcopalians, Disciples of Christ, Baptists and some Congregationalist churches were represented (R. 129). Among Protestant groups in Champaign, at least Lutherans, Quakers, Unitarians, Jehovah's Witnesses and some Congregationalist churches were unrepresented (R. 122-124-125, 218-221).

[13] The International Council of Religious Education is a Protestant organization of clergymen, religious educators and laymen organized to help promote religious education, principally through weekday religious instruction.

[14] The National Education Association reported in 1946 that only in nine states were released time classes held within public school buildings to the knowledge of state superintendents of education. National Education Association, *supra* note 11, at 36. On the other hand, the U. S. Office of Education estimated in 1940 that, on the primary school level, approximately 40% of the released time classes are held within public school buildings, while 30% are held within the public school buildings on the high-school level. Davis, *supra* note 11, at 27. However, of the almost 25,000,000 elementary and high school pupils only 164,073 were reported to the Office of Education to be attending released time classes. *Id.* at 24. It is significant that when "released time" or "excusing children for religious instruction" is spoken about by students of the problem, it is generally assumed that the religious instruction is conducted off the public school premises. See, *e.g.*, National Education Association, *supra* note 11, at 29; Johnson, *supra* note 7, at 129.

[15] Shaver, *Remember the Weekday—To Teach Religion Thereon*, International Council of Religious Education (undated).

Under the plan instructors engaged by the Champaign Council obtained permission from appellees to enter the ten elementary schools and the single junior high school in the district for the purpose of conducting religious education classes during regular school hours (R. 267). Thirty-five religious education classes were being held in the Champaign public schools at the time of the trial of this suit; thirty-one were Protestant; four Catholic (R. 91). There had been no classes in Jewish religion for at least two years (R. 224). The instructors in religion were engaged by the Champaign Council (R. 93), subject to the approval and supervision of appellees' superintendent of schools (R. 127).

At the beginning of each term, cards were distributed to the public school children by their regular teachers on which parents could indicate their consent to the enrollment of their children in the religious instruction classes (R. 176). Children who obtained such consent were released by the school authorities from their secular work for a period of thirty minutes each week in the elementary schools and forty-five minutes in the junior high school (R. 62). If the majority of children in a particular class participated in the religious instruction they remained in their regular classroom; the children who did not participate were sent to other parts of the school building, sometimes accompanied by their regular teachers and sometimes not (R. 62). Only the Protestant instruction was conducted within the regular classroom; where children were released for Catholic or Jewish instruction they left their classroom with their respective religious teacher for instruction in some other part of the building (R. 150). When the religious instruction was conducted in the regular classroom, which was apparently the usual place (R. 63), the regular teacher frequently, if not always, remained at her desk during the instruction period (R. 137). At the end of the session the religious instructor left the classroom, the children who had participated in Catholic or Jewish instruction or who had not participated in any religious in-

struction returned, and regular class work was resumed (R. 63).

During the first half of the 1944-1945 school year appellant's son, James Terry McCollum, and one other boy, Elwin Miller, were the only ones in their class who did not participate in the religious education class; during the second half only appellant's son did not participate. All attended the Protestant class. In the public school attended by the McCollum boy, as in eight of the eleven public schools in Champaign, only Protestant instruction was given (R. 150) and the trial court found that Catholic and Jewish children attended the Protestant classes (R. 65). Terry McCollum's secular teacher, Mrs. Taylor, regularly remained at her desk while the religious instruction was being given. On one occasion appellant's son was placed at a desk in the hall where he was subjected to teasing and harassment by passing children who assumed that he was being punished, called him an atheist and jeered at him (R. 175, 185). On other occasions he was placed in an unoccupied room with the door closed (R. 193, 254), but, after a complaint by appellant, both practices were discontinued and he was thereafter sent to another fifth grade class where he remained until the thirty-minute religious instruction period was over (R. 68).

The Issue

By deleting the word "voluntary" from the statement of the Illinois Supreme Court, we can agree that the record "presents the simple question, does * * * the Federal constitution * * * in [its] guaranty of religious freedom, prohibit *voluntary* religious classes in the public schools under the plan as disclosed by this record?" (R. 279). In more general terms the question presented to this Court is whether a statute or regulation permitting religious instruction in public school classrooms during school hours is a law respecting an establishment of religion within the prohibition of the First and Fourteenth Amendments.

Related to this issue but, we believe, unnecessary for its determination is the question of the validity of the released time program as it is generally effected by conducting the religious instruction classes off the school premises.[16] Nor is it necessary for the Court to determine the constitutionality of permitting the use of public school buildings for religious instruction or worship after regular school hours and completely independent of public school auspices.[17]

Summary of Argument

We urge that in permitting the intrusion of religion into the public school system by classes devoted to religious instruction or worship on public school premises during regular school time allotted for that purpose by public school authorities, Illinois, through a local board of education, has made a law respecting establishment of religion in violation of the First and Fourteenth Amendments of the Constitution.

We submit that the released time program disclosed by the record violates the Constitution in that the state thereby

1. Prefers one religion over another in addition to aiding all religions;
2. Influences and compels children to attend religious instruction against their parents' will and their own;
3. Renders financial aid to sectarian instruction;
4. Participates in religious instruction.

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[16] *Cf. People ex rel. Lewis* v. *Graves*, 245 N. Y. 195 (1927); *Stein* v. *Brown*, 125 N. Y. Misc. 692 (1925); *People ex rel. Latimer* v. *Board of Education*, 394 Ill. 228 (1946); *Gordon* v. *Board of Education*, — Cal. (2d) —, 178 P. (2d) 488 (1947).

[17] *Cf.* 5 A. L. R. 866, 886 *et seq.*; National Education Association, *supra* note 11, at 20; Johnson, *supra* note 7, ch. X.

Argument

The extreme limits of a state's power under the "establishment of religion" clause of the First Amendment were defined explicitly by this Court in *Everson* v. *Board of Education of the Township of Ewing*.[18] It declared that since the "Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers," unneutral acts would transgress these limits. In that case the Court spelled out the types of state conduct which "favor" religions and thus transcend the limits of state power. The Court said:[19]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person* to go to or to remain away from church against his will or force him *to profess a belief or disbelief in any religion.* No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis added.)

We believe that permitting religious instruction in the public school violates each of these italicized prohibitions.

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[18] 330 U. S. 1 (1947).

[19] *Id.* at 15-16.

POINT I

The First and Fourteenth Amendments prohibit not only State action which prefers one religion over another but also State action which aids all religions.

A. Even if religious instruction during school hours within the public school does not prefer one religion over another, it is unconstitutional since it aids all religions.

Much is made by appellees and the Illinois Supreme Court of the claim that no preference is accorded to any particular sect but that all may partake of state aid on equal terms (R. 62, 269). We shall later demonstrate this claim is unreal. But even if it were factually valid, its relevancy is limited at best to a determination of the extent of appellants' powers under the Illinois constitution. The concept of separation of church and state as embodied in the First Amendment is broader than the same concept as embodied in the Constitution of Illinois and of some of our other states.

This was expressly recognized by this Court in the *Everson* case when it held that the broad concepts of the First Amendment, as embodied in the Fourteenth, deprive the state of power not merely to aid "one religion" but to "aid all religions" as well, and prohibit it from deviating from neutrality "in its relations with groups of religious believers and non-believers." [20]

It is, of course, true that the separation of church and state as evolved in many of the states, and particularly in New England, was not a separation of religion from the state but a particular religion or sect. The constitutions of these states assume worship; they guarantee freedom in the choice of the form of that worship, but prohibit preference to any particular sect." [21] It was this limited con-

[20] 330 U. S. 1 (1947).

[21] See, *e.g.*, Constitutions of Connecticut (Art. VII, sec. 1), Florida (Preamble, sec. 6), Illinois (Art. II, sec. 3), New Hampshire (Art. 6th).

cept of separation which Illinois inherited and incorporated in its constitution and laws. The emphasis and underlying theme is upon non-preference among denominations. This limited concept explains appellees' insistence [22] that appellant's lack of religious belief places her beyond the pale of constitutional protection, a position which strikingly demonstrates the essentially unneutral position taken by appellees as between believers and non-believers in religious dogma. It explains also the Illinois Supreme Court's insistence that since the Champaign public school authorities are willing to confer their benevolent aid upon all religious groups desiring to participate in the plan for religious instruction within the public schools no constitutional prohibition was violated. The Illinois Supreme Court said (R. 279):

> Our government very wisely refuses to recognize a specific religion, but this cannot mean that the government does not recognize or subscribe to religious ideals. We find such recognition in the very preamble to our State constitution. The government does not recognize a particular faith but this does not mean that it is indifferent to religious faith. To deny the existence of religious motivation is to deny the inspiration and authority of the Constitution itself.

The concept of separation embodied in the First Amendment, however, followed the pattern of Virginia rather than New England. In Virginia the perseverance of Jefferson and Madison resulted in the adoption of a broader concept. The Virginia Assessment Bill in seeking to revive the tithes, suspended since 1777, specifically broadened the scope of its operation to include dissentient religious denominations by permitting free choice in designating "what society of Christians" was to receive each person's tax.[23]

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[22] Appellees' Brief before Supreme Court of Illinois, p. 26.

[23] James, THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA (1900) ch. X, XI; Eckenrode, SEPARATION OF CHURCH AND STATE IN VIRGINIA (1910) 91.

While this compromise caused substantial diminution in the opposition to the Bill, Madison's unyielding continuance of the struggle finally proved successful, the Assessment Bill died in Committee and Jefferson's Bill for Religious Freedom was finally enacted in 1786,[24] embodying the concept that religion is wholly exempt from the cognizance of civil society.[25]

B. The released time plan in Champaign and elsewhere does prefer some religions over others.

We submit that sectarian instruction within the public school during school hours necessarily results in according a preference to particular religious sects or dogma.

In the first place, the fact that Protestant religious instruction is conducted in the same classroom in which the regular classes are held (R. 137), whereas the Catholic children are required to leave the room and go to a basement room (R. 150), operates as an obvious preference.[26]

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[24] James, *supra* note 23, at 140.

[25] Madison's *Remonstrance, supra* note 1, at par. 1. An effort was made to amend the preamble to insert, "a departure from the plan of Jesus Christ, the Holy Author of our Religion," but the amendment was rejected by a great majority, "in proof," says Jefferson, "that they mean to comprehend within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohamedan, the Hindoor and the Infidel of every denomination." 1 Jefferson's *Works* (Ford ed. 1892) 62. Jefferson's bitter opposition to the maxim that Christianity is a part of the law of the land is well known. *Id.* at 362.

[26] See also, *Herold* v. *Parish Board of School Directors*, 136 La. 1034, 1050 (1915):

> And excusing such children on religious ground, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. Equality in public education would be destroyed by such act, under a Constitution which seeks to establish equality and freedom in religious matters. The Constitution forbids that this shall be done.

But, far more important, it is clear that not every religious denomination is accorded the privilege of participating in the system. Discrimination results from the requirement that all applicant groups "work together" (R. 127) through the Champaign Council of Religious Education, which is composed of representatives only of the traditional Protestant, Catholic and Jewish faiths. This requirement, far from being unique to Champaign, is customary wherever released time is practiced.[27] It effectively eliminates participation not only by Jehovah's Witnesses,[28] a strongly evangelical group which would welcome an opportunity to enter the public schools, but by all groups espousing unpopular religious dogmas. It is not an accidental but an intended, inevitable consequence of the released time plan that there is no record of participation anywhere in the United States by religious groups other than those teaching traditional Protestantism, Catholicism, and, infrequently, Judaism. Indeed, the requirement of cooperation in curriculum content among the Protestant groups (R. 162) has operated in Champaign, as well as elsewhere, to render impossible participation by so traditional a group as the Lutheran Church (R. 122, 162). Thus Rev. Cartlidge of the Presbyterian Church, a member of the Champaign Council, testified (R. 162):

> I would welcome the Lutherans but the council reserves the right in its cooperative movement with the Lutherans represented upon it that no prejudicial personalities or materials be put in the courses. We intend to protect the courses against antagonistic matter being taught. As far as we are able to, we examine the material to be sure none is antagonistic to other religious organizations.

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[27] International Council of Religious Education, *The Weekday Church School*, Educational Bulletin No. 601 (1940) 2-3.

[28] See concurring opinion of Mr. Justice Jackson in *Douglas* v. *City of Jeannette*, 319 U. S. 157, 170-174 (1943), for an example of the teachings of Jehovah's Witnesses in respect to organized religions in general and the Catholic Church in particular.

Invoking aid of the public school system in furthering religious education inevitably results in preferential treatment to the particular sect dominant in the community. Many cases can be cited involving preference to Protestant teachings by use of the Protestant version of the Bible or Protestant hymns and prayers.[29] There are a large number of cases the effects of which can be construed as conferring preferential treatment to Catholic teachings, including permission to wear clerical garb by school teachers,[30] the incorporation of parochial schools into the public school system [31] and the furnishing of free textbooks for use in parochial schools [32] or free transportation to such schools.[33] All, we believe, establish that preferential treatment to particular sects is an inevitable consequence of sectarian intrusion upon the public school system.

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[29] See cases cited *infra* note 50.

[30] *Hysong* v. *Gallitzin Borough School District*, 164 Pa. 629 (1894); *Sargent* v. *Board of Education*, 76 N. Y. App. Div. 588 (1902); *Commonwealth* v. *Herr*, 229 Pa. 132 (1910); *Gerhardt* v. *Heid*, 66 N. D. 444 (1936).

[31] *State ex rel. Johnson* v. *Boyd*, 217 Ind. 348 (1940); *Gerhardt* v. *Heid*, 66 N. D. 444 (1936); *State ex rel. Public School Dist. No. 6* v. *Taylor*, 122 Neb. 454 (1932); *Collins* v. *Kephart*, 271 Pa. 428 (1921); *Knowlton* v. *Baumhover*, 182 Iowa 691 (1918); *Williams* v. *Trustees Stanton Dist.*, 173 Ky. 708 (1917); *Atchison, T. & S. F. Rld. Co.* v. *City of Atchison*, 47 Kans. 712 (1892); *Synod of Dakota* v. *State*, 2 S. D. 366 (1891); *State ex rel. Nevada Orphan Asylum* v. *Hallock*, 16 Nev. 373 (1882); *Jenkins* v. *Inhabitants of Andover*, 103 Mass. 94 (1869); *Hlebanja* v. *Brewe*, 58 S. D. 351 (1931); *Opinion of the Justices*, 214 Mass. 599 (1913).

[32] *Borden* v. *Louisiana State Board of Education*, 168 La. 1005 (1929); *Smith* v. *Donahue*, 202 N. Y. App. Div. 656 (1922); *Chance* v. *Mississippi State Textbook Board*, 190 Miss. 453 (1941); *Haas* v. *Independent School District*, 69 S. D. 303 (1943).

[33] *Everson* v. *Board of Education*, 133 N. J. L. 350 (1945); *Nichols* v. *Henry*, 301 Ky. 434 (1945); *State ex rel. Traub* v. *Brown*, 36 Del. 181 (1934); *Board of Education* v. *Wheat*, 174 Md. 314 (1938); *Judd* v. *Board of Education*, 278 N. Y. 200 (1938); *State ex rel. Van Straten* v. *Milquet*, 180 Wis. 109 (1923); *Gurney* v. *Ferguson*, 190 Okla. 254 (1941); *Mitchell* v. *Consolidated School District*, 17 Wash. (2d) 61 (1943); *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469 (1942).

POINT II

By permitting religious instruction in the public schools during regular school hours the State is influencing and even compelling children to attend religious instruction and worship against the will of their parents and their own.

Compulsory attendance at religious worship or instruction violates both aspects of the First Amendment: it establishes religion and abridges the free exercise thereof. Appellees would not, of course, contend that they may constitutionally impose upon non-attendance at religious instruction a direct sanction such as expulsion from the public school system.[34] But the absence of such a direct and overt sanction does not necessarily render the choice of the child and his parents completely voluntary. If, by reason of circumstances within the control of the public school authorities the child may reasonably believe that by non-attendance he will incur the displeasure of the public school authorities, the result is constitutionally the same, even though no specific act of punishment is inflicted or even threatened. If, by reason of circumstances within the control of the public school authorities, the child who does not attend is singled out and subjected to harassment and discomfort, attendance cannot be said to be voluntary.[35]

[34] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943), but *cf.* text, at footnote 22, *supra*.

[35] Admittedly, the Supreme Court of Illinois found that "the religious education classes are voluntary" (R. 272), but the term was clearly used to distinguish the situation in the present case from that in *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334 (1910), wherein participation in religious worship was compulsory; the Illinois Court did not decide the point we stress here. In any event, any finding by the Illinois Court that attendance was voluntary would not be binding upon this Court, which must determine independently whether attendance was in fact voluntary. *Chambers* v. *State of Florida*, 309 U. S. 227, 228-229 (1940); *Pierre* v. *State of Louisiana*, 306 U. S. 354, 358 (1939).

The law recognizes that the difference between compulsory and voluntary is one of degree and that conduct in the in-between area may be the legal equivalent of one or the other depending upon the relationship of the parties. If the relationship is one of trust or dependence, conduct which otherwise might be deemed to constitute no more than a suggestion or invitation may be deemed the legal equivalent of a command.[36] This Court has already established that conduct on the part of a State short of compulsion is prohibited under the Constitution. Neither a state nor the Federal government, this Court said in the *Everson* case, "can force nor influence a person to go to or to remain away from church against his will".[37] Under the Champaign plan, and indeed wherever the public school welcomes the intrusion of sectarian religion, the child is certainly "influenced" within the meaning of this rule. The facts disclosed by the record establish that the pressures exerted upon a ten-year-old child, and through him on his parents, render impossible an unfettered choice.

In the first semester of the fifth year the McCollum boy and one other were the only children in the class who did not participate in religious education. In the second semester, only the McCollum boy failed to participate (R. 132). When Miss Chapin, the person designated by the Champaign Council on Religious Education to teach the Protestant classes, came into the class, he alone rose from his seat and left the room, to return thirty minutes later on Miss Chapin's departure (R. 133).

The exclusion from class, however, was but the beginning of the process whereby he was singled out as "not belonging". His mother's refusal to allow his participation—a refusal which must have seemed capricious and

[36] *Cf. International Association of Machinists v. NLRB*, 311 U. S. 72, 78 (1940): "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure."

[37] 330 U. S. 1, 15 (1947).

unreasonable to Mrs. Taylor, his public school teacher—posed the latter with an administrative problem which she was either unable or unwilling to solve without causing the boy pain and discomfort.[38] She obviously did not know what to do with him during the religious instruction period. She could not devote her time to him, for that would interfere with her joining in the religious instruction. Searching for a solution, she placed the boy at a desk in the hall, a procedure sometimes employed as a method of punishment (R. 193). Passing schoolmates teased him, believing that he was being punished for being an atheist and for not participating in religious instruction (R. 269), a misconception pregnant with significance.

Mrs. Taylor found nothing wrong with this arrangement and probably would have continued it, at least while the music room was being used (R. 257). The boy, however, came home crying as a result of the experience and his mother protested to the school authorities, thereby bringing an end to this practice (R. 193).

When the music room (which was next to the teachers' washroom) was unoccupied, Mrs. Taylor placed him there alone, making certain that the door remained closed (R. 255). Protests from appellant brought a stop to this practice, too, whereupon Mrs. Taylor finally arrived at what was undoubtedly, to her, the happy solution of depositing him with the other fifth grade teacher for the period of

[38] The problem of what to do with the unreleased school child is one of the insoluble problems of the system. In Syracuse, N. Y., the Board of Education merely directs that "schools are to avoid attractions * * * that may cause pupils who are regularly excused to remain in school" and leaves the rest to the ingenuity and discretion of the principal or teacher. *Religious Education on Excused School Time, Board of Education*, Syracuse, N. Y. (Sept., 1945). Elsewhere, the conscientious principal or teacher tries, as best she can, to balance the equities between those leaving and those remaining. Davis, *supra* note 11, at 55; Public Education Association, *supra* note 6 (1945) at 10-11. Less conscientious teachers, however, are likely to adopt the expedient procedure employed by Mrs. Taylor, frequently referred to in the profession as "dumping."

religious instruction (R. 257), with the result that the latter's pupils too observed the consequence of heterodoxy. A child does not relish being singled out as different, particularly where the difference consists of not participating in activities approved and encouraged by public authorities. The regular teacher's presence in the class established in the children's eyes that religious education was not merely socially acceptable, but approved. In a ten-year-old child fear of being singled out as a nonconformist is a potent determinant of conduct.[39] In a case involving Bible reading and prayer recitation in public school, the Illinois Supreme Court itself acknowledged this, stating:[40]

> The Kentucky and Kansas decisions seem to consider the fact that the children of the complainants were not compelled to join in the exercises as affecting the question in some way. That suggestion seems to us to concede the position of the plaintiffs in error. The exclusion of a pupil from this part of the school exer-

[39] *Cf.* Prescott, EMOTION AND THE EDUCATIVE PROCESS (1938) 117; Plant, PERSONALITY AND THE CULTURAL PATTERN (1937) 277, 278, 288; Nimkoff, THE CHILD (1934) 111.

[40] *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 351 (1910); see too, the following cases, also involving Bible reading and worship: *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 199-200 (1890):

> When * * * a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible which a majority of the other pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others.

Knoxlton v. *Baumhover*, 182 Iowa 691, 699-700 (1918):

> Conceding, for argument's sake, that such attendance was voluntary, in the sense that no requirement or command was laid upon non-Catholic pupils to attend or take part in such exer-

> cises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain of the pupils must be excused from it because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the constitution.

The trial court below in the present case also recognized the existence of a "natural embarrassment in being the only one in his room who did not take the religious education courses and who went out to study by himself because of that fact" (R. 69).

The framers of the First Amendment were clearly determined to put an end to what Madison called "that diabolical, hell-conceived principle of persecution".[41] The non-conformists who had fled Europe to escape persecution

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> cises; yet, surrounded as they were by a multitude of circumstances all leading in that direction, impelled by the gregarious instincts of childhood to go with the crowd, and impressed with a sense of respect for their teachers, whose religious principles and church affiliation were unceasingly pressed upon their notice by their religious dress and strictly ordered lives, could a reasonable person expect the little handful of children from non-Catholic families to do otherwise than to enter the invitingly opened door of the church, and receive, with their companions, the instructions there given?

Kaplan v. *Independent School District of Virginia*, 171 Minn. 142, 155-156 (1927) (dissent):

> To excuse some children is a distinct preference in favor of those who remain and is a discrimination against those who retire. The exclusion puts a child in a class by himself. It makes him religiously conspicuous. It subjects him to religious stigma. It may provoke odious epithets. His situation calls for courage.

[41] Letter to Bradford, January, 1774, 1 WRITINGS OF JAMES MADISON (1900) 11.

for religious beliefs, themselves visited cruel punishment upon those refusing to conform to orthodox beliefs and practices.

This Court has stated: [42]

> The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question.

Persecution and oppression are the almost invariable consequence of attempts by the state to promote sectarian dogma or aid sectarian groups.[43] "Cruel persecutions" as this Court has said, "were the inevitable result of government-established religions". [44] Discord and strife are the equally inevitable result of government-sponsored religious education.

During the early Colonial period the most common penalties inflicted were imprisonment, pillory and banish-

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[42] *Davis* v. *Beason*, 133 U. S. 333, 342 (1890); see also, *Reynolds* v. *United States*, 98 U. S. 145, 162-164 (1878). For a general survey of persecution because of religious beliefs in America, see: Cobb, RELIGIOUS LIBERTY IN AMERICA (1902) ch. 4, 5; Myers, HISTORY OF BIGOTRY IN THE UNITED STATES (1943) ch. 2; Sweet, STORY OF RELIGIONS IN AMERICA (1930) ch. 4, 5; Beard, BASIC HISTORY OF THE UNITED STATES (1944) 19-23; Beard, 1 RISE OF AMERICAN CIVILIZATION (1930) 60 *et seq.*

[43] "Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions." Madison's *Remonstrance*, *supra* note 1, at par. 11. See also *id.* at par. 9.

[44] *Everson* case, 330 U. S. 1, 12 (1947).

ment for heterodoxy.[45] We have progressed far since Colonial times and Terry McCollum could not be imprisoned for refusing to enroll for religious instruction. But he could be confined alone in a closed room on the far side of the school building. He could not be placed in an actual pillory; but he could be subjected to the public obloquy and ridicule, which was the objective of the pillory, by being placed at a desk in the public corridor to be jeered at and scorned by his schoolmates. He could not be banished from Champaign or even from the public school because of his refusal to conform,[46] but he could be "dumped" into another class for the period of religious instruction.

Terry McCollum's experience was not an isolated or exceptional incident. Many of those who have studied the released time system have found persecution and compulsion employed, with varying degrees of intensity, so frequently as to lead to the conclusion that sooner or later they would be regularly employed wherever the system was in operation. One observer writes:

> Once boards of education sanction religious instruction on school time, school officials tend to assume a responsibility for enforcing enrollment as well as attendance.[47]

Another reports:

> The majority of pupils left in school * * * are penalized for not going to religious instruction. Successive directives have come curtailing their activity. They may not do the things they might be permitted to do during a regular study period. They may not go to the music room, the art room, the sewing room, the typing room, the library, to a teacher for help or to

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[45] Weaver, THE ROAD TO THE FREEDOM OF RELIGION (1944) 56; James, *supra* note 23, at 18.

[46] But see note 48 *infra*, for cases of expulsion because of refusal to participate in religious instruction or worship.

[47] Thayer, RELIGION IN PUBLIC EDUCATION (1947) 89.

make up a test. They may not stir from a 14 by 14 seat for one clock hour.[48]

A cruel dilemma is faced by children of minority religious groups wherever sectarian religion intrudes upon the public school—either being singled out as non-conformists or being subjected to religious dogma at variance with what they learn at home or in their religious schools. In Champaign, as in many other communities, some of them chose the second alternative as the lesser evil (R. 65).[49]

Terry McCollum's regular teacher, Mrs. Taylor, recognized the impelling influence of the fear of "not belonging" and advised appellant to permit her son to participate in the religious education class (R. 135, 192).[50] Mrs. Taylor denied that she exerted any other influence or pressure upon appellant or her son to obtain his participation, although Terry McCollum testified positively that she urged him to enroll on at least three or four occasions (R. 175, 182) and there is at least some corroboration in the record of this type of pressure (R. 195, 214, 217). In the light of the almost complete enrollment for Protestant instruction

[48] Moehlman, THE CHURCH AS EDUCATOR (1947) 114; see also, Beckes, *supra* note 6, at 25. For State cases illustrating the persecution and oppression, principally of Catholic children, resulting from the intrusion of sectarian instruction or worship upon the public school system, see: *State ex rel. Finger* v. *Weedman*, 55 S. D. 343 (1929); *Spiller* v. *Inhabitants of Woburn*, 94 Mass. 127 (1866); *People ex rel. Vollmar* v. *Stanley*, 81 Colo. 276 (1927); *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334 (1910); *Hackett* v. *Brooksville Graded School District*, 120 Ky. 608 (1905); *Billard* v. *Board of Education of Topeka*, 69 Kans. 53 (1904); *Church* v. *Bullock*, 104 Tex. 1 (1908); *Donahoe* v. *Richards*, 38 Me. 376 (1854).

[49] The trial court found that all of the Protestant groups were taught by Miss Chapin and Mrs. Jorgenson and that children of some thirty-one sects, including Catholic, Jewish and Protestant, as well as many children without any particular religious preference, took these courses (R. 65).

[50] See *supra* note 42; see also, Brown, SOCIOLOGY OF CHILDHOOD (1938); Jersild, CHILD DEVELOPMENT AND THE CURRICULUM (1946) ch. 5.

in Mrs. Taylor's classes, notwithstanding the religious diversity of her pupils,[51] and the actual experience with religious instruction on released time even off the public school premises,[52] it is difficult to accept Mrs. Taylor's testimony. Observers of the released time program hostile, neutral and friendly, have found that teachers, principals and public school authorities sympathetic to religious education generally urge pupils and their parents to participate.[53] Even in New York City, with its diversified religious population, regulations prohibiting comment by public school principals or teachers on a child's attendance or non-attendance for religious instruction at church centers are widely disregarded by teachers and principals and pressure upon children to attend is imposed by teachers.[54] Whether or not Mrs. Taylor urged Terry McCollum to enroll for religious education or whether or not any particular public school teacher urges any particular pupil to enroll, the danger of such undue influence is so implicit in the intrusion of sectarianism upon the public school system, that sufferance of such intrusion must be deemed a law respecting an establishment of religion.

It is no answer that appellant resisted the pressures to which she and her son were subjected and did not authorize her son's participation. Constitutionally proscribed conduct does not become permissible because it is inefficacious.

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[51] Considerably less than 50% of the American population is affiliated with any church. 1 CENSUS OF RELIGIOUS BODIES (1936) 86, U. S. Dept. of Commerce.

[52] Davis, *supra* note 11; Public Education Association, *supra* note 6.

[53] Thayer, *supra* note 47, at 89; Beckes, *supra* note 6, at 8; Williamson, *supra* note 9, at 10; Davis, *supra* note 11, at 32, 39; Blair, *A Case For the Weekday Church School*, Frontiers of Democracy (Dec. 15, 1940) 76.

[54] Public Education Association (1943) *supra* note 6, at 7-8; *id.* (1945) *supra* note 6, at 7, 15.

A dissenter's right includes freedom from State-imposed sanctions. The State of Illinois, having enacted a compulsory school attendance law (R. 39) and having established a public school system, may not penalize children attending its public schools for availing themselves of what it has itself recognized as a constitutional "freedom not to worship".[55]

In the struggle for constitutional liberties, the few who have had the courage to resist authority have not been alone in their views. Many who have chosen to yield have shared the views of the bold. There can be no doubt that the virtual unanimity of response in Terry McCollum's class was not the result of a corresponding homogeneity in the composition of his class or of a similar unanimity about the value or merits of instruction in Protestant dogma. Rather, it meant that many parents and children preferred not to invoke the displeasure of the school authorities by protest. But even if only he objected, the constitutional issue would be no different. Religious liberty is not subject to limitation by majority vote.[56]

POINT III

The use of facilities paid for out of tax-raised funds for religious instruction in public schools during regular school hours is prohibited by the Constitution.

We do not consider it necessary to emphasize that the expense incurred by appellees as a result of the released time classes constituted an expenditure of tax-raised funds

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[55] *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 340 (1910).

[56] "We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True, it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority." Madison's *Remonstrance*, *supra* note 1, at par. 1.

for a non-public purpose.[57] Those who seek to ward off sectarian encroachments upon the public school system are not motivated by a desire to prevent the increased taxation which may result from a waste of public funds, but by a wish to maintain, in the words of Jefferson, "a wall of separation between church and State".[58] Resort at an earlier time to the former method of attack resulted from the failure to appreciate clearly that the "Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact" laws respecting an establishment of religion,[59] and that it "protects the citizens against the State itself and all of its creatures—Boards of Education not excepted".[60] Actually, this concept is implicit in the assertion of the public-funds-for-non-public-purpose claim. A State's broad power to define public purpose[61] does not extend to declaring religious instruction to be a public purpose which may validly be supported by public funds, because the Constitution has established, as it were, a conclusive presumption that no public purpose is served by State support of religious instruction. A State may make public business of secular education but it may not, because the First Amendment prohibits laws respecting establishment of religion, make public business of religious instruction. For this reason, we do not stress the oblique attack predicated upon the non-public purpose theory and limit our argument to the basic premise: appellee's action constituted a prohibited law respecting an establishment of religion.

We do not mean to imply that the expenditure of public funds resulting from intrusion of religion upon the public

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[57] *Loan Association* v. *Topeka*, 20 Wall. 655 (1874); *Parkersburg* v. *Brown*, 106 U. S. 487 (1882); *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1937).

[58] *Reynolds* v. *United States*, 98 U. S. 145, 164 (1878).

[59] *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940).

[60] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 637 (1943).

[61] *Green* v. *Frazier*, 253 U. S. 233 (1920).

school system is not a vital factor in this case. As indicated hereafter, we lay great stress thereon. But these expenditures are relevant only because they are elements in the establishment of religion. Madison remonstrated against the imposition of "a small tax for religion" [62] long before it was adjudicated unconstitutional to impose a tax for non-public purposes.

Appellees urge, and the Illinois trial and Supreme Courts found (R. 78-279, 275), that the expense incurred by the public school system as a result of the operation of released time system (wear and tear on furniture, electric current on dark days, etc.) was so slight as to fall within the *de minimis* rule.

We urge, however, with respect to financial and material aid: (1) that the *de minimis* rule has no application where the restraints of the First Amendment are involved, and (2) that the expense to the State revealed by this record was by no means negligible. In assessing these arguments it must be recognized that, had Champaign adopted the illegal policy of teaching religion through its regular classroom teachers, the expense to the town would have been the same, the only difference being that the teachers would have spent their time teaching instead of observing.

A. The *de minimis* rule has no application to the restraints of the First and Fourteenth Amendments on establishment of religion by the State.

The *de minimis* rule has no application where State expenditures are attacked as an aid to religion and hence a law respecting an establishment of religion.

The monetary loss suffered by a taxpayer as a result of a slight waste of public funds may be too insignificant to warrant invoking the judicial process to obtain redress,[63] at least where the object of the expenditure is not expressly prohibited by the Constitution. In respect to matters of

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[62] Eckenrode, *supra* note 23, at 105.

[63] *Cf. Massachusetts* v. *Mellon*, 262 U. S. 447, 486-487 (1923).

religious liberty and separation of church and state, however, the quantity of the monetary appropriation is without significance. When a State makes any appropriation, no matter how slight, for religious purposes, religion has come within the cognizance of Civil Government".[64] Madison well recognized this when he warned: "That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."[65] It is, we submit, the fact, not the extent, of State aid which controls.[66] This Court has not previously considered the extent of a State expenditure for religion as relevant in determining its constitutionality, even where the attack was based wholly or partly on the public-funds-for-private-purpose theory. In the *Everson* case, the total expenditure of the State of New Jersey for the transportation of parochial school students was only $357.74, disbursed over a six months period,[67] considerably less than the expense incurred by the Champaign Board of Education. *Cochran* v. *Board of Education*[68] involved an expense resulting from the wear

[64] Madison's *Remonstrance*, *supra* note 1, at par. 8.

[65] *Id.* at par. 3.

[66] In *Stein* v. *Brown*, 125 N. Y. Misc. 692 (1925), a system of released time for religious instruction off the public school premises was invalidated because the cards signed by parents were printed by pupils on public school presses. The court said (p. 695): "The fact that no particular denomination was favored or intended so to be by this action of the board of education does not affect the question. The fact is that the property of the board was permitted to be used directly in aid of such schools of religious instruction whose members saw fit to avail themselves of the action taken by the defendants. It seems perfectly clear that it was illegal for the defendants to permit the printing of the cards to be done on its presses." In *People ex rel. Lewis* v. *Graves*, 127 N. Y. Misc. 135, *aff'd* 219 App. Div. 233, *aff'd* 245 N. Y. 195 (1927), the validity of the released time system was sustained and *Stein* v. *Brown* was distinguished on the ground that use of public school presses was not involved in the later case.

[67] Transcript of Record in *Everson* case, p. 49.

[68] 281 U. S. 370 (1930).

and tear on a few textbooks loaned to children, as compared with the regular, weekly use over a five-year period of school classrooms and furniture as in the instant case (R. 61-62). The Court, in the *Cochran* case, disposed of any possible suggestion that the *de minimis* rule might have any relevancy by expressly stating:[69]

> The [Louisiana] Court also stated, *although the point is not of importance in relation to the Federal question*, that it was "only the use of the books that is granted to the children, or, in other words, the books are lent to them." (Emphasis supplied)

Thus the Court recognized that a State's power to lend the use of State property is not constitutionally distinguishable from its power to give the property and that the sole test was whether the parochial school or the child was the actual beneficiary of the State's aid.[70]

The *Everson* and *Cochran* cases were decided on grounds which had no relation to the amounts of money involved. This Court was there called on to decide only whether benefits were being conferred upon children or upon religious institutions, or whether benefits which accrued to the latter were incidental or direct.[71]

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[69] *Id.* at 375.

[70] Would the appellees contend that the system would be constitutionally permissible if the regular instructors conducted the religious courses but the proportionate part of their salary were paid by the religious bodies rather than the public school system?

[71] An illogical extreme of the *Everson* decision may be sought by appellees as is suggested in the following extract from the record (p. 242):

> As a school administrator I believe it would be very inconvenient and impractical to release children from the school in Champaign for the purpose of their going for religious education to church buildings. Because of the distance it would be impracticable in some cases, and would expose the children to danger, because the schools which are located in the north, northwest and southwest parts of our city are quite a distance from churches. It would mean traveling 10 to 15 blocks across busy traffic streets. We have a pedestrian hazard in the City of Champaign. (See also R. 158.).

There can be no doubt, however, that the benefit here conferred is conferred upon religious groups. Those who promote the released time plan justify invoking State aid on the ground that moral behavior and ethical conduct can be assured only, or at least most effectively, by means of religious education and that for reasons of both duty and expediency the State should use its instrumentality, the public school, to effect as widespread a dissemination of religious instruction as possible.[72]

But, if the value of religious education in character training constitutionally justified financial and other State aid to such education, a State's power to grant free textbooks to children attending religious schools would not be limited to secular textbooks [73] nor its power to provide for transportation of children to religious schools limited to those in which secular subjects are also taught.[74]

American Jewry, as we emphasized at the outset, places as high a value as any group on a well-planned and well-directed program of religious education. The framers of our Constitution, however, recognized clearly what some contemporary proponents of released time and similar programs fail to see; that the State aids religion most when it maintains a strict barrier between itself and religion and that any breach in that barrier jeopardizes freedom of religious belief and worship.

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[72] See, *e.g.*, Shaver, *The Weekday Church School—Opportunity and Challenge*, Information Service, Department of Research and Education, Federal Council of Churches of Christ in America (May 29, 1943):

> When parental indifference or other circumstances have failed to give a child a healthy body society has stepped in by means of private or public agencies—to see that he has soundness of health. The same principle has been applied in giving every child his mental training, regardless of whether parents cared or could afford it. Social welfare is jeopardized as much or even more if any child is denied his right to know and to make use of all that society has learned in the area of religion.

[73] *Cochran* v. *Board of Education*, 281 U. S. 370 (1930).

[74] *Everson* case, 330 U. S. 1 (1947).

B. The State expenditures here involved were so substantial as to negate the *de minimis* rule in any case.

Even if we accept the frame of reference adopted by the Illinois court, it is impossible to justify the conclusion reached by it. Its approach, we submit, is unreal and completely ignores basic principles of public school administration and cost accounting.

First it should be noted that, even if the *de minimis* rule applies, the test must be, not the effect of the expenditure on the State and hence the taxpayer, but the effect on the religious institutions which are benefited. Since the rule can be invoked only to show that a given impairment of constitutional prohibitions is negligible, only the extent of that impairment is relevant. Hence, if the religious institution or institutions are substantially benefited, it makes no difference that the expense involved is small in comparison with the total State budget.

There can be no doubt here that the benefit to those religious groups participating in the released time plan is substantial. The released time system is advocated by its proponents as an invaluable device for insuring inculcation of religious principles. To them, the influence of the public school in obtaining attendance at religious instruction is the most attractive feature of the released time plan. The evolution of the plan, from the general cultural program originally envisaged to the integrated plan involving public school time and premises, disclosed by this record can be explained only by the desire to attain increasingly larger attendance at the religious classes. But even on a strictly financial basis, the benefits are substantial.

This case does not involve merely an occasional meeting on school premises, as the Illnois Supreme Court seems to imply (R. 275). It involves the regular use of school rooms and school equipment in all the public schools of Champaign for five years. What is disclosed by the record is not a

slight, occasional use of school property, but a regular, systematic participation in the total operations of the public school system.

The religious education courses are so integrated into the general curriculum of the Champaign public schools that the only adequate way of measuring their cost is by assigning to them a proportionate part of the total educational costs of the public school system.

The average school day in Champaign consists of five and one-quarter hours of teaching (R. 111) or twenty-six and one-quarter hours weekly; not less than one-half an hour weekly is devoted to religious education (R. 62). Hence approximately one-fiftieth of the entire school budget for Champaign must be treated as devoted to religious education. Such an expenditure, involving thousands of dollars,[75] cannot be treated as negligible.

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[75] The record does not disclose the total budget of the Champaign public school system, but, according to the United States Office of Education, during the period involved in this case, 1944-1945, Illinois expended $169.02 annually for each child in the public school system, being the third highest state in this respect. Biennial Survey of Education in the United States, U. S. Office of Education (1944-1946). See also, *Hearings before Committee on Education and Labor on S. 717 and S. 181*, 79th Cong. 1st Sess., (1945) 20, 85-87, 280. At least 850 pupils participated in the religious classes. Assuming that the average expenditure in Champaign is the same as the average for Illinois as a whole, appellees' expenditures for religious education approximated $2,735.47 annually, or $13,677.35 for the five-year period during which the system has been in operation in Champaign. This, of course, is no more than a rough approximation, but no more than a rough approximation is needed for comparison with the $357.74 expended for parochial school transportation in the *Everson* case and to establish that the expense to the Champaign public school system was not negligible.

POINT IV

By permitting religious instruction in the public schools during regular school hours the State is engaging in such instruction.

A. Released time classes in Champaign and elsewhere constitute religious instruction.

We do not believe it necessary to justify the contention that a State may not itself inculcate the tenets of any particular religion. We do not mean that public schools may not engage in teaching, the purpose of which is to impart information about and appreciation of religion and religions, rather than to inculcate particular religious beliefs.[76] Without necessarily conceding the point such teaching possibly may be included in the public school curriculum without violating constitutional bans. What is involved here, however, as well as wherever the released time program is carried on, is the *inculcation* of religion (R. 94-105, 139-143, 151).

There can be little doubt that what the record discloses and what is universally given in released time classes is sectarian religious instruction.[77] The trial court found that:

> The Jewish classes of course would deny the divinity of Jesus Christ. The teaching in the Catholic classes of course explains to Catholic pupils the teaching of Catholic religion, and are not shared by other students

[76] See R. 219-220 for an illustration of such teaching.

[77] The content and method of the Protestant teaching disclosed by the record are substantially similar to that recommended by the International Council on Religious Education and used in most Protestant released time classes. See: Religious Education, *The Protestant Program of Teaching* (Jan.-Feb., 1945) 16-22; International Council of Religious Education, *supra* note 27, at 12-15; Davis, *supra* note 11, at 50-54. For content and method of Catholic teaching in released time programs, see: Collins, *Released Time for Religious Education, American Ecclesiastical Review* (Aug., 1946) 133.

who are Protestants or Jews. The teachings in the Protestant classes would undoubtedly, from the evidence, teach some doctrines that would not be accepted by the other two religions (R. 66).

Indeed, the record establishes that even in the Protestant classes, the teachings would not be accepted by a number of important Protestant denominations (R. 121-123, 124-125, 135, 149, 218-221).[78]

B. The State may not participate in religious instruction.

It is obvious that under the First Amendment the Federal Government could not itself conduct religious instruction. Disestablishment in Virginia, and consequently in the Federal Government, came about as a result of the defeat of an Assessment Bill introduced because "the general diffusion of Christian knowledge * * * cannot be effected without a competent provision for learned teachers".[79] If the First Amendment means anything, the Federal Government may not make "provision for learned teachers" of religion, and *a fortiori* may not itself engage teachers of religion or otherwise inculcate religious beliefs.[80] Since the "Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact" laws respecting an establishment of religion,[81] it is equally obvi-

[78] There are at least 256 different religious denominations with churches in this country. 1 CENSUS OF RELIGIOUS BODIES (1936) 9, U. S. Dept. of Commerce. It is probably impossible to teach even the Bible in a manner acceptable to all the Protestant denominations. Moehlman, *supra* note 48, ch. VIII.

[79] Preamble to Assessment Bill, annexed as supplemental appendix in *Everson* case, 330 U. S. 1 (1947).

[80] The First Amendment, in the form originally passed by the Senate on September 9, 1790, read in part as follows: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion." Records of the U. S. Senate, 1A-C2, U. S. Nat. Archives, quoted by Mr. Justice Reed, dissenting in *Jones* v. *Opelika*, 319 U. S. 105, 124 (1943) footnote 6.

[81] *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940).

ous that the public school authorities of Champaign could not themselves include religious instruction as part of the regular curriculum.

The Supreme Court of Illinois has itself recognized that "religious instruction * * * is not within the province of civil government".[82]

Nor would it be material that attendance at the religious instruction classes might not be compulsory. Compulsory attendance was no longer an issue when Jefferson and Madison finally won the long struggle for disestablishment by the adoption of the First Amendment. Long before disestablishment was effected in Virginia by the defeat of the Assessment Bill and the enactment of the Bill for Religious Liberty, the statute requiring attendance at church worship was repealed.[83] In any event, compulsory or not, it can hardly be doubted that participating in the inculcating of the tenets of religion is aid to religion within the proscription of the *Everson* case.

It would, we submit, be equally immaterial that the public school authorities offered separate religious instruction for each of the sects represented in the community. As we have demonstrated, under the Federal Constitution, a State is incompetent to aid all religions, even if none is singled out for preferential treatment.

C. The State participates in the religious instruction in released time classes in Champaign and elsewhere.

We submit that the system of religious instruction prevailing in Champaign, as well as wherever religious instruction is given within the public school building during school hours, cannot help but involve the participation of the public school system in religious instruction. This inevitably results when the State permits use of its public school system to inculcate religious beliefs.

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[82] *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 343 (1910).

[83] *Cobb, supra* note 42, at 491-493.

The fact that sectarian dogma is taught within the public school building with the approval of the public school authorities helps give these teachings, as far as the child is concerned, a cloak of unimpeachable authority. The common disclaimer that the views of a writer or commentator do not necessarily reflect those of the publisher or sponsor is ample evidence that even an adult would make such an assumption. With children such an assumption is not only reasonable, it may well be inevitable. A child, as any parent knows, can think of no more convincing authority for a statement than the fact that "he learned it in school".[84]

The presence of the regular teacher in the classroom during the religious instruction period serves further to give to sectarian tenets the stamp of the public school's authority and approval.

The record establishes that Mrs. Taylor, the secular teacher, frequently, if not customarily, remained at her desk in the classroom while religious instruction class was being conducted.[85] Other regular teachers followed the same practice (R. 92).

To the average child, the public school teacher is the sovereign of the classroom. He cannot conceive that the teacher would permit statements to be made in the classroom, unless she was prepared to vouch for their literal and factual truth.[86] Admittedly, as far as the record

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[84] *Cf.* Nimkoff, *supra* note 39, at 203; Zachry, EMOTION AND CONDUCT IN ADOLESCENCE (1940) 277.

[85] She testified:

> When the art supervisor comes in I turn the pupils over to her. She teaches a lesson in art. While she is teaching I observe. I do the same thing when the music supervisor comes in. At times I do the same thing when the religious education teacher comes in, not all the time (R. 131).
>
> * * * * * * *
>
> Part of the time I observed religious education lessons. To a certain extent I observed what was being taught. * * * (R. 133).

[86] *Cf.* Schneiderman, DEMOCRATIC EDUCATION IN PRACTICE (1945) 44-45. See also *supra* note 84.

reveals, the secular teacher does not participate orally in the religious instruction. In view of the relationship of confidence and trust between teacher and students, however, this is hardly material. The teacher's failure to disavow is as eloquent as her affirmative approval would be.

The substantial effect, if not the intent, of the released time program as revealed in the record is to equate in the mind of the child the religious class with other classes. Religious instruction, like all other instruction, is given in the public school building and in the same classrooms (R. 133). The pupils occupy the same seats as they do in the secular classes (R. 133). Following the practice in other classes, a special teacher enters the classroom while the regular teacher remains to observe (R. 132). Because the religious instruction classes are conducted at various periods during the school day rather than at the end of the day, the implication that they are distinct or different from other courses is avoided (R. 132, 147). The children are under the supervision of the same public school authorities while taking religious instruction, just as they are while being taught other subjects (R. 243). The cards for enrollment in the religious instruction classes are distributed and collected by the regular public school teachers (R. 94, 133, 148, 152, 171, 256). When a child is absent from religious instruction, the religious teacher turns in a slip, furnished by the school, "just like any other teacher would to the superintendent's office" (R. 224).

Every phase of the released time program thus serves to involve the authority and facilities of the public school system and to place the authority of the latter behind the religious instruction as behind other classes. This equalization of religious instruction is intentional rather than accidental, for the principal purpose of the released time program is to make religious instruction an integral part

of the general education provided by the public school system.[87]

The inevitable effect of this equalization and integration, we therefore submit, is that the public school system is engaged in constitutionally-forbidden sectarian instruction.

In addition, the public school system partjcipates in the religious instruction by passing upon the qualifications of the religious teachers, supervising their activities (R. 127) and censoring their teachings (R. 162).

CONCLUSION

Since the adoption of the First Amendment, the United States has escaped much of the bitter religious conflict and sectarian strife which have riven other parts of the world and driven men to violence and bloodshed. That good fortune has been due largely to two of the truly great contributions the American people has made to western civilization: the concept of the separation of church and state and the free public school system. The first, by protecting religion against the intrusion of civil authority and by making it impossible for the state to become a battleground for sectarian preference and favor, has preserved both our political freedom and our religious freedom. The second, by providing for the education of our children on terms of complete equality and without cognizance of their differences in religious beliefs or disbeliefs, has been the cornerstone of our American democracy. The intrusion of sectarianism upon the public school system, as we have shown

[87] Gove, RELIGIOUS EDUCATION ON PUBLIC SCHOOL TIME (1926) 19; McPherson, *The Protestant Program of Teaching*, Religious Education (Jan.-Feb., 1943) 22; Blair, *supra* note 53, at 76; "The one big contribution which was claimed for weekday church schools and still is held, was that they would help make religion an integral part of the public school experiences of boys and girls."

in this brief, both threatens the separation of church and state and challenges the traditional integrity of the public schools. That intrusion, if permitted and sanctioned as sought by appellees, will destroy the institutions which have preserved religious and political freedom in the United States and which have prevented religious warfare in this nation. We believe that continued preservation of the victory which the Fathers of the Constitution won for political and religious liberty requires reversal of the judgment herein.

October 24, 1947.

Respectfully submitted,

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SYNAGOGUE COUNCIL OF AMERICA
and
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Supreme Court of the United States

October Term, 1947

No. 90

PEOPLE OF THE STATE OF ILLINOIS *ex rel.*
VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, and ELMER C. BASH and ALICE J. BASH, and WANDA I. BASH, a Minor, by ELMER C. BASH, Her Father and Next Friend,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION AND BRIEF, *AMICUS CURIAE*, BY THE PROTESTANT COUNCIL OF THE CITY OF NEW YORK, with special reference to the New York Statute and Judicial Decisions sanctioning "Released Time".

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No 90

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Appellees.

PETITION OF THE PROTESTANT COUNCIL OF THE CITY OF NEW YORK FOR LEAVE TO FILE THE ANNEXED BRIEF *AMICUS CURIAE*, WITH SPECIAL REFERENCE TO THE NEW YORK STATUTE AND JUDICIAL DECISIONS SANCTIONING RELEASED TIME.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Protestant Council of the City of New York hereby petitions for leave to file herein the annexed brief *amicus curiae*, in order to place before this Court the *statutory* system in New York State, known as Released Time, and the judicial decisions which have upheld its legality and constitutionality.

The Protestant Council is the federation of the Protestant Churches and educational agencies in the City of New York.

The Protestant Council, in association with Catholic and Jewish groups, has been a sponsor of the Released Time program in New York City since the passage of the New York Statute in 1940 (L. 1940, ch. 305): It participates in assuring the conduct of that program in New York City in accordance with the rules and regulations for Released Time established under authority of that Statute by the New York State Commissioner of Education and by the Board of Education of New York City.

There are now on Released Time over 100,000 public school children in New York City, and a greater number in the rest of the State. The totals are steadily increasing.

In 1940 the Legislature amended Section 625B-2 of the Education Law, which Section carries the subtitle of "Amount and character of required attendance", by adding thereto the following additional sentence (L. 1940, ch. 305):

> "Absence for religious observance and education shall be permitted under rules that the commissioner (the State Commissioner of Education) shall establish."

This 1940 Statute was, in substance, a legislative sanction of a practice which for many years previously had been established and conducted by numerous local Boards of Education throughout the State, although not in New York City. In *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, decided May 10, 1927, the State Court of Appeals had upheld as lawful and constitutional the pre-statutory practice of Released Time as established by the Board of Education of the City of White Plains, N. Y.

According to this White Plains plan, children were excused, at the request of parents so desiring, once a week for the last half-hour of the school session to attend religious instruction at church centers selected by the parents and *located off the school grounds.*

After the passage of the 1940 Statute, the New York State Commissioner of Education established certain rules for this plan of Released Time and the Board of Education of the City of New York established certain supplementary rules. Both sets of rules are quoted at length in the brief which the Council desires to submit.

As already stated, the constitutionality of this New York plan for Released Time, both before and since its sanction by the 1940 Statute, was settled by the unanimous decision of the New York State Court of Appeals in *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, decided May 10, 1927, and affirming like decisions by the lower courts.

As set forth in the brief which the Council submits, like statutes have been enacted in many other states of the Union; and the Council believes that knowledge of this statutory plan for Released Time and references to the judicial decisions upholding it as legal and constitutional will be of great aid to the Court in considering and deciding the issues in this case.

Counsel for the Council has received a telegram from Mr. Walter F. Dodd, attorney for the appellant herein, reading as follows:

> "I consent to your filing an amicus curiae brief in the McCollum case."

Counsel for the appellees state that they have adopted the set rule of not consenting to the filing of briefs *amicus curiae*, that they feel that they cannot make an exception in this instance but that (to quote their telegram) "any other cooperation we will gladly extend."

The required number of copies of the Council's brief *amicus curiae* are herewith filed with the Clerk of this Court. The Council respectfully requests that the Court grant permission for its acceptance by the Court.

November 21, 1947.

Respectfully submitted,

THE PROTESTANT COUNCIL OF THE CITY OF NEW YORK

By CHARLES H. TUTTLE
Chairman of the Council's Board of Christian Education

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Preliminary Statement

This brief is submitted in order to place before this Court the *statutory* system in New York State, known as Released Time, and the judicial decisions which have upheld its legality and constitutionality.

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There are now on Released Time over 100,000 public school children in New York City, and a greater number in the rest of the State. The totals are steadily increasing.

The New York Statute for Released Time

In 1940 the Legislature amended Section 625B-2 of the Education Law, which Section carries the subtitle of "Amount and character of required attendance", by adding thereto the following additional sentence (L. 1940, ch. 305):

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This 1940 Statute was, in substance, a legislative sanction of a practice which for many years previously had been established and conducted by numerous local Boards of Education throughout the State, although not in New York City. In *People ex rel. Lewis* v. *Graves*, 245 N. Y.

195, decided May 10, 1927, upholding as lawful and constitutional the pre-statutory practice of Released Time as established by the Board of Education of the City of White Plains, N. Y., the New York Court of Appeals described that practice as follows (pp. 196-7):

> "Persons interested in religious instruction of the children in the public schools of the State have recently inaugurated a plan which has been put in operation in the city of White Plains and, with varying details, elsewhere. As it operates in White Plains, the plan is to excuse from school attendance children between the ages of seven and fourteen years, on the written request of parents, one day in each week, for the last half-hour of the school session, which is a study period, so that they may attend one of the several denominational church schools which give religious instruction during such period. The child so excused loses no school recitations and receives no credit for the work taken in the church school. The city of White Plains does not use public money to aid the church schools, although the co-operation between the public schools and the church schools requires a slight use of the time of the school teachers in registering and checking up excuses. The plan is governed by suitable regulations of the school authorities but does not rest on any legislative enactment."

The Rules for Released Time, as Established by the State Commissioner of Education and by the New York City Board of Education, Pursuant to the New York Statute

A

Under Sections 90 and 94 of the New York Education Law, the Commissioner of Education "is the chief executive officer of the state system of education and of the board of regents."

Section 94 further provides:

> "2. He (the Commissioner of Education) shall have general supervision over all schools and institutions which are subject to the provisions of this act, or of any statute relating to education, and shall cause the same to be examined and inspected, and shall advise and guide the school officers of all districts and cities of the state in relation to their duties and the general management of the schools under their control."

Under authority of the New York Released Time Statute the State Commissioner of Education promulgated on July 4, 1940 the following regulations, which are still in force:

> "1. Absence of a pupil from school during hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil.
>
> "2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

B

Under Section 310 of the New York Education Law, local Boards of Education are given general powers to adopt rules concerning the order, discipline and conduct of the local public schools, to prescribe the courses of study, and to effectuate the laws as to education.

On November 13, 1940, the Board of Education of the City of New York issued the following rules for the purpose of effectuating in New York City the statutory authorization of Released Time and the foregoing rules established by the State Commissioner of Education:

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

"2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their chil-

dren with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

"3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week, except that in classes on a departmental schedule release will be limited to the last period of the program.

"5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

"6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

The chief characteristics of New York Statutory Released Time

The characteristics of statutory Released Time in New York are:

1. The religious instruction is given *outside* the school buildings and grounds;
2. The pupil is excused for the purpose *only* upon the written request of the parent or guardian;
3. The absence is limited to one hour a week, such hour to be the last hour of the school session;
4. The religious organizations, in cooperation with the parents, must assume full responsibility for attendance at the religious center and for the program of religious instruction thereat;
5. The released pupils must be dismissed from school in the way usual in the case of permitted absences;
6. The school authorities have no responsibility beyond that assumed in regular dismissals;
7. The parent's written request is filed with the school and will not be available or used for any other purpose;
8. The religious organization or center will file with the school a card attendance record for each pupil excused from the school pursuant to the parent's request;
9. There must be *no comment* by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction.
10. The plan has the sanction of a *statute* enacted because deemed "necessary to promote the general well-being of the people". (*Everson* v. *Board of Education*, 330 U. S. 1, 6-7.)

The Decisions of the New York Courts in *People ex rel. Lewis* v. *Graves*, Upholding the Constitutionality of the New York Plan of Released Time

The Preamble of the New York State Constitution, adopted by vote of the people on November 8, 1938, reads:

> "We, The People of the State of New York, *grateful to Almighty God for our Freedom*, in order to secure its blessings, Do Establish This Constitution." (Emphasis supplied.)

The New York State Constitution also provides (Article XI, Section 4):

> "§4. Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning. (Formerly §4 of Art. 9. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)"

In 1926 the Board of Education of the City of White Plains, N. Y., adopted a regulation for excusing pupils in its public schools, upon the written request of their parents, for thirty minutes in the afternoon of one day a week, for the purpose of attendance at centers of religious instruction which were off the school grounds and were provided by the churches of the various denominations in the city. The relator Lewis, President of the Freethinkers'

Society of New York, applied for a peremptory writ of mandamus commanding the State Commissioner of Education to forbid this practice. The relator's petition expressly prayed for an adjudication that the White Plains plan of Released Time was (Record on Appeal, p. 13, fol. 39):

> "in violation of the laws and constitutions of this state and of the United States respecting education and the separation of church and state."

The Special Term of the Supreme Court of the State of New York (Staley, J.) upheld this White Plains program, denied the writ, and said (127 Misc. 135, 140):

> "That the right of the parent to direct the training and nurture of the child is a fundamental right;
>
> "That the obligations of citizenship require the promotion of a spirit of patriotic and civic service and the fostering in children of moral as well as intellectual qualities;
>
> "That the religious conscience, conviction and accountability are the least dispensable foundations for good citizenship and real patriotism;
>
> "That moral growth and intellectual growth go hand in hand to make the essential elements of character and good citizenship;
>
> "That the right of the State to enforce school attendance does not mean that the mental and moral development of all children must be limited to a common mould, and that all children must be standardized;
>
> "That the regulation does not create a union between church and State, or teach any sectarianism in the schools or invade the religious freedom or conscience of any individual."

The Appellate Division of the Supreme Court unanimously affirmed this decision, and said (219 App. Div. 233, 238):

> "• • • The Commissioner and local authorities have adopted a benevolent policy in which the interests of both parents and children are considered. They recognize that all education is not acquired in the schools; that except for subjects legally prescribed, the parents may select the studies their children shall pursue; that it is the right of parents to direct the destiny of their children and guide them along paths of filial duty as well as in those of obligation to the State (*Pierce* v. *Society of Sisters*, 268 U. S. 510, 535); and that a belief in religion is not foreign to our system of government. (*Holy Trinity Church* v. *United States*, 143 U. S. 457, 465; *People* v. *Ruggles*, 8 Johns. 290, 294.)"

The Appellate Division further said (p. 239):

> "The State by its educational policy seeks to build from its youth useful citizens of intelligence and character, not merely pedants and philosophers. In following this policy it should not only consider the wishes but invite the aid of parents. When the wish of parents for week day religious instruction for their children involves no serious interruption to school attendance, the State can have no purpose to defeat it. If local school authorities render their assistance by methods so innocuous as those detailed here, it does not amount to illegality. Reasonableness in the method adopted is the test of such legality. Neither the local school officers nor the Commissioner of Education have here violated that rule."

The State Court of Appeals thereupon also unanimously affirmed, and said (245 N. Y. 195, 198-9):

> "• • • Practical administration of the public schools calls for some elasticity in this regard and

vests some discretion in the school authorities. Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. As a matter of educational policy, the Commissioner doubtless may make proper regulations to restrict the local authorities when the administration of the plan of week-day instruction in religion or any plan of outside instruction in lay subjects in his judgment interferes unduly with the regular work of the school. * * *

"Eternal vigilance is the price of constitutional rights. But it is impossible to say, as matter of law, that the slightest infringement of constitutional right or abuse of statutory requirement has been shown in this case."

The relator's motion for reargument was denied (245 N. Y. 620).

This decision of the New York Court of Appeals was subsequently cited by that Court with approval in *Lewis* v. *Board of Education of the City of New York*, 258 N. Y. 117, 123, and in *Judd* v. *Board of Education*, 278 N. Y. 200, 211.

In 1929 the Board of Education of the City of Chicago adopted a program of Released Time similar to the White Plains program upheld by the New York Court of Appeals in *People ex rel. Lewis, supra*, except that the authorized period of absence was one hour instead of half an hour. An attack was made on the action of the Chicago Board of Education as violative both of the Illinois Constitution and of the United States Constitution; but in *People ex rel. Latimer* v. *Board of Education*, 394 Ill. 228, the Supreme Court of Illinois upheld the Chicago program with principal reliance on the New York decisions in *People ex rel. Lewis, supra.*

Subsequently and as recently as May 8, 1947, the District Court of Appeals of California, in the case of

Gordon v. *Board of Education of the City of Los Angeles*, 78 Cal. App. (2d) 498; 178 Pac. (2d) 488 (review denied by the California Supreme Court), upheld as constitutional a California statute similar to the New York statute in its sanction of Released Time and upheld a practice thereunder closely resembling the New York plan established by the New York educational authorities as above described. The California court relied on the New York decisions in *People ex rel. Lewis* v. *Graves, supra*, and the Illinois decision in *People ex rel. Latimer* v. *Board of Education, supra;* and said (p. 494):

> "No one who keeps pace with the trends of modern society can deny that instruction of the youth of the state in faith and morality is of utmost necessity and importance. All too regretfully it must be said that in present-day American life the family as a unit has not done its part in this vital field of education of our boys and girls. Else juvenile courts would not be groaning under an avalanche of cases of derelictions of children. What more logical advance could be made in the science of sociology than the unification of religious leaders in a coordinated effort to teach children faith and morality—and for that purpose to excuse them from schools for one hour a week to go to the church or tabernacle or synagogue of their parents' choice?"

The Appellant's brief herein cites the New York Special Term decision in *Stein* v. *Brown*, 125 Misc. 692 (June 23, 1925); but that decision was rendered before the foregoing decisions of the New York courts in *People ex rel. Lewis* (where it was the principal reliance of the unsuccessful appellant) and before the enactment of the New York Statute in 1940. Moreover, in that case the cards recording the absences of the pupils for religious instruction were printed in the school, during school hours, on printing presses belonging to the Board of Education.

Concerning this Special Term decision in the *Stein* case, *American Law Reports, Annotated*, says (167 A. L. R., p. 1474):

> "The effect of this decision is greatly weakened by the decision in the preceding case (*People ex rel. Lewis* v. *Graves*) which was later in point of time and determined by a higher court."

Subsequent to the decisions in *People ex rel. Lewis*, the Legislature of the State of New York enacted the aforesaid Chapter 305 of the Laws of 1940 which put legislative recognition and support behind those decisions and their principles.

Governor Lehman's Memorandum on Signing the New York Statute

In approving and signing the bill which incorporated the amendment as to Released Time into the New York Education Law, Governor Lehman said:

> "Under this bill the State Commissioner of Education shall establish rules under which children may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education.
>
> "For some time it has been the practice in many localities in the State to excuse children from school a certain period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws. In so holding the Court of Appeals pointed out: 'Neither the Constitution or the law discriminates against reli-

gion. Denominational religion is merely put in its proper place outside of public aid or support.'

"However, at the present time there is no uniformity of practice throughout the State. Nor is any officer or agency of the State authorized or charged with the responsibility of adopting rules under which absences for religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules.

"A few people have given voice to fears that the bill violates principles of our Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system."

Statutes in Other States Similar to the New York Statutory Program of Released Time

The Appellant's brief in the present case now before this Court, says (p. 17):

> "Statutory authorization of such a plan is found not only in New York but also in Iowa, Kentucky, Maine, Minnesota, Oregon, South Dakota and West Virginia; Minnesota permitting an absence of three hours a week (Minnesota Statutes, sec. 132.05, subdivision 3) • • •."

Bulletin 1941, No. 3, published by the Federal Security Agency, U. S. Office of Education, says (p. 5):

> "Special legislative authorization for the release of public-school pupils during school hours for religious education was reported for Iowa, Kentucky, Maine, Minnesota, New York, Oregon, South Dakota, West Virginia, and for Hawaii and the Philippine Islands.

> Four of the 8 state laws were enacted during the last 2 years, 1939-40 (Kentucky, Maine, New York, and West Virginia). Certain similarities appear in the legal specifications. For example, all but the Iowa law require a signed request from parents or guardians before a pupil may be released for the weekday classes and 7 of the laws specify the amount of time each week during which pupils may be away from school."

California has since adopted in 1943 a like statute. (*California Education Code, Section 8286; Gordon* v. *Board of Education*, 78 Cal. App. 2d 498.)

As far as we know, no court has ever held unconstitutional any of these statutes.

The American Tradition

Furthermore, it cannot be emphasized too strongly or too frequently that the American tradition from its earliest days is and continues to be that "this is a religious people".

Such was the explicit and elaborated declaration of this Court in *Holy Trinity Church* v. *United States*, 143 U. S. 457, where this Court read into a federal statute forbidding the importation of aliens under contract to perform labor in the United States an implied exception of a contract by a religious society to employ as its rector or minister an alien clergyman.

After analyzing the history and nature of the federal statutes relating to the employment of aliens, this Court said (p. 465):

> "But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation."

This Court thereupon quoted from the numerous historic documents which hold a revered place in the history of America and of the United States, and said (pp. 470-1):

> "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons; they are organic utterances; they speak the voice of the entire people. * * *
>
> "If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth."

In view of this American history and tradition, the Supreme Court of Illinois was profoundly right when it said in the present case:

> "To deny the existence of religious motivation is to deny the inspiration and authority of the constitution itself."

The New York Statutory Program of Released Time is a Recognition of the Constitutional Right of Parents and Guardians to Religious Conviction and Freedom in the Education of Their Children.

(1) Under the Constitution of the United States and in the very nature of our free society the most fundamental liberty of all is, to use the words of this Court in the *Oregon School Law* case (*Pierce* v. *Society of Sisters*, 268 U. S. 510, 534), "the liberty of parents and guardians to direct the upbringing and education of children under their control."

The tragic events which have befallen the world since that opinion was delivered by a unanimous court in 1925

illuminate the profound truth of the following further sentences therein (p. 535):

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

In *Prince v. Massachusetts*, 321 U. S. 158 (1944), this Court said (p. 166):

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

In *In re Stuart*, 114 Fed. (2d) 825 (1940) the United States Court of Appeals for the District of Columbia said (p. 832):

> "Under our constitutional system, the citizen has more than a revocable privilege to possess and to rear his children. Under our theory of government there is recognized as inherent in parents a right to maintain the custody and to direct the upbringing and education of their own offspring. True, this right is not absolute. If parents treat their children with cruelty or neglect, or are unfit in character or mode of life suitably to control their association and upbringing, the state for the welfare of the child and society may interfere. But rights guaranteed by the constitution are not to be qualified either by legislation or judicial action having no reasonable relation to some purpose within the competency of the state."

In *Palko* v. *Connecticut*, 302 U. S. 319 (1937), this Court said, concerning "*freedom of thought and speech*", (p 327):

> "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action."

(2) The New York Statute authorizing Released Time is designed to protect and give reasonable freedom to the exercise of this liberty on the part of parents.

Its purpose is to assist those parents, who wish to do so, to discharge this obligation of so interpreting to their children the standardized system of public education that it will not restrain and negate their high duty to prepare their children for the additional obligations of life and for its spiritual verities in accordance with their conscience and religious convictions.

This Statute merely recognizes this most fundamental of all democratic principles of liberty. It enables parents, who are so moved, to remind their children that they are not the mere creatures of the state and that a public standardized and compulsory system of secular education is not intended to imply that spiritual faith and education in religious conviction may not be regarded as vital equipment for life and citizenship.

In all this there is no violation whatever of the principle of a separation of church and state. Such separation does not preclude recognition by the state of this fundamental right of liberty on the part of parents and the reasonable freedom which they should have in preventing

what they may regard as implications adverse to religious faith from any overshadowing standardized system of compulsory secular education.

Who can validly deny this right to parents who believe that education divorced from faith is a menace to the life of the individual and to democracy itself? Who shall say that they have not the right to enjoy this principle of religious freedom?

(3) The public schools of today, with attendance compulsory for most of our children, have expanded to the dimensions of life itself. They provide for the education of children in practically every human interest except religious faith. They extend their secular instruction to matters of origin, destiny and human relationships, with all of which religion is vitally concerned.

The omission and ignoring of religion by such schools can convey (however unintentional) a powerful disparaging implication and inclination of mind. Many anxious parents feel that secularism and her twin-sister materialism monopolize this dynamic approach to the mind of children.

Multitudes of parents have the right to a conviction, and indeed have the conviction deep in their hearts, that there is an implied negation and exclusion as regards spiritual ideals and spiritual faith, and that such implied negation and exclusion are at the root of much of the disorders and tragedies of our times. The New York Statute does no more than to give to such parents a means of expression and activation for such conviction and for the discharge of what they regard as their high duty not only toward their children but toward the system of public education itself and toward democracy itself.

(4) The world knows from centuries of bitter and bloody experience that every rising dictatorship or totalitarianism seeks, as its first and most urgent effort, to remove from parents the control of the mind of the child and the youth, and to cast the young mind into the uniform mold deemed to be best suited to its own tyrannical purpose and monolithic ideology.

Parents have a right to fear, and many do fear, that implications in a system of purely secular public and compulsory education may convey to their children's minds that the objective of being is to make a living rather than a life; and they have a right to fear that such a public system can carry to the young mind the conviction, whether so intended or not, that God is not a serious and essential factor in human existence and civilized society.

Under the secular techniques of our present public and compulsory educational system, the First of the Two Great Commandments can have no place in the curriculum of study. What, then, are the rights of parents who feel that this exclusion will convey to their children that the First Commandment must be a delusion or of no account, and that in a generation or two the Second Commandment, which is like unto the First, must consequently follow it into neglect and oblivion?

Overseas, we have seen to our terrible cost that a great people who were led to embrace a system of ideological education which omitted the First Commandment, soon accepted the thesis that the Second Commandment had no application where it interfered with the purposes of the state and that any kindness which interfered with the official ideology would be severely punished as a sin.

Eternal vigilance is, as wisdom has so often said, the price of liberty. Free people, free parents, free churches, have the right to be on guard against the consequences of secularism in major control of the interpretation of life,

and to expect (and indeed demand) that room be made for recognition of the spiritual nature, obligation, dignity and destiny of every individual. They have the right to entertain and express the fear that mere secularism, when carried to dominance over the mental capacities of the child, will make easier the stealthy approach in America of the ravenous doctrine which is even now again stalking its prey throughout the world, that man is made for the state, not the state for man. They have the right to believe that a total exclusion from public education of recognition of religion may amount in the minds of their children to indoctrination in irreligion.

(5) Those among us who are parents have a right—a basic constitutional right—to demand that the State shall not expose our children to what we conceive to be these evil implications and dangers, without affording some antidote—some counterbalance—in the public secular system of education itself. Those who so believe have the right—the constitutional right—to see and to seek in a reasonable plan for Released Time just such an antidote, just such a counterbalance. And, equally, the State has the constitutional right, indeed the duty, to afford to parents who have such convictions and desires, just such an antidote—just such a counterbalance.

And where do those who say that the public compulsory educational system shall have no room at all for such conviction and freedom, get the "right" to impose their will on all religious people and parents who hold different views as to the meaning and purpose of education and of life, and who have the primary responsibility for the character, happiness and responsibility of their own children? Do those who would so impose their will get their "right" to do so from some assumed privilege of primacy for their own beliefs, or from some alleged majority will, or from

some prerogative of the state? An affirmative answer to any of these three alternatives denies the doctrine of the *Oregon School Law* case and strikes at the basic freedom on which all individual liberty must rest.

(6) In New York and many other states, Released Time has come to be regarded as, in some degree at least, the antidote—the counterbalance—which may be utilized by parents so minded, and which will enable them and the State itself to show to their children that Education and the State are not opposed to religion and religious belief and do not intend to convey that the public system invites the ignoring of spiritual values.

This Statute involves nothing which is basically new. This idea and plan of Released Time had been accepted and practiced by many boards of education in New York State before the New York Court of Appeals sanctioned it in the *White Plains* case some twenty-one years ago. It has received the support of the great majority of the citizens of New York, irrespective of creed; and that support has been steadily increasing as the wise administration of the plan has shown that none of the fears expressed concerning it has been found justified.

On August 12, 1939, *the Chamber of Commerce of the State of New York* adopted the following statement:

> "By and large States are not preserved and strengthened by culture or education or knowledge. They stand on—character, morals and physical well being."
>
> "Accordingly, we place First on our list of things necessary to produce 'The Schools New York State Wants' a Deep, True, Religious Understanding and Viewpoint."
>
> "If this Nation does not maintain its religious foundation—its whole structure will fail."

"We do not want church differences mixed up in our schools; but we do want our scholars to appreciate and understand the importance of their following and making the most of the faith with which they are identified. We want them to know and to live by the basic rules of life which each will find in his own religion."

"In spite of the fact that some hesitate to include religion in our educational program, we place it first."

If such a commercial and non-sectarian body as the New York State Chamber of Commerce can take this view as to our standardized secular public school system, have individual parents not the right to take the same view and to see in this Statute for Released Time a charter of freedom for their views as to the relation between education and spiritual faith?

On November 13, 1940, when the adoption of rules for Released Time was under public discussion before the Board of Education of the City of New York, the *Jewish Education Committee of New York*, speaking through Hon. Mark Eisner, said to the Board:

"The Jewish Education Committee of New York desires to record its readiness to cooperate with the Board of Education of the City of New York in its plans for furnishing time for religious education for the children of the City of New York.

"We believe that religious education is an essential part of the complete education of all American children.

"We believe that religious education should be given by the respective churches and religious organizations of the city, and that it should receive the sanction and moral encouragement of the entire community.

"We believe that the public schools can encourage religious education without jeopardizing in any way

the precious principle of separation between State and Church; and that this can be achieved by reducing by one hour per week the time required for attendance at public school for all pupils, enabling them to take advantage of this hour for religious instruction in their respective churches."

In Educational Bulletin No. 601, entitled "The Weekly Church School" and published in 1945 by *The International Council of Religious Education*, which is the interdenominational organization of the Protestant Churches for Religious Education, there are these statements descriptive of the basic principles of and justifications for Released Time (p. 1):

"1. Although the public schools undertake to equip the younger generation to cope with every kind of life problem through an education 'as broad as life', they usually omit all reference to religion. Certainly this omission tends to put religion among the children's marginal interests. The weekday church school is at present the only organized effort to integrate religion with the child's total educational experience. • • •

"5. Since the weekday program on released time is planned for all children—Roman Catholic, Jewish, Protestant, and others—it furnishes an unparalleled opportunity for each faith to understand the others through engaging in cooperative enterprises. In communities sponsoring weekday schools, religion can stand united against irreligion instead of standing one group over against another. So the weekday school program can become a signifi ant demonstration of a free church and a free public school cooperating in the total education of children and youth, without violating the principle of the separation of church and state."

On November 15, 1949, *the Catholic Bishops of the United States,* in a public statement on secularism, declared:

> "In no field of social activity has secularism done more harm than in education. In our own country secularists have been quick to exploit for their own purposes the public policy adopted a century ago of banning the formal teaching of religion from the curriculum of our common schools. With a growing number of thoughtful Americans, we see in this policy a hasty and short-sighted solution of the very difficult educational program that confronts public authority in a nation of divided religious allegiance.
>
> "But it should ever be kept in mind that the original proponents of the policy did not intend to minimize the importance of religion in the training of youth. Erroneously, however, secularists take this policy, adopted as a practical expedient in difficult circumstances, and make it the starting point in their philosophy of education. They positively exclude God from the school. Among them are some who smile indulgently at the mention of the name of God and express wonder that inherited illusions last so long. Others are content with keeping God closeted in the inner chambers of private life.
>
> "In the rearing of children and the forming of youth, omission is as effective as positive statement. A philosophy of education which omits God, necessarily draws a plan of life in which God either has no place or is a strictly private concern of men. There is a great difference between a practical arrangement which leaves the formal teaching of religion to the family and to the church, and the educational theory of the secularist who advisedly and avowedly excludes religion from his program of education."

The foregoing official statements from Jewish, Protestant and Roman Catholic sources, and from the Chamber

of Commerce, are a sobering diagnosis of the maladies which have taken root in American society and which threaten its solidarity through loss of emphasis and awareness of spiritual values and moral obligations.

(7) Nor in this New York Statute is there any element of segregation. All parents, all children and all religious faiths are treated alike and all pupils whose parents request it will leave the same classroom at the same moment. Our schools already excuse pupils for the observance of days regarded as holy by their respective faiths; and such observance has not been found to create segregation notwithstanding that the observance of a particular holy day affects only the children of a particular faith.

Respectfully submitted,

THE PROTESTANT COUNCIL OF THE CITY OF NEW YORK,

By Charles H. Tuttle,
Chairman of the Council's Board of Christian Education.

CHARLES H. TUTTLE, *Counsel*,
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NOV 24 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 90.

PEOPLE OF THE STATE OF ILLINOIS ex rel. VASHTI McCOLLUM,
Appellant,

v.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, and ELMER C. BASH and ALICE J. BASH, and WANDA I. BASH, a Minor, by ELMER C. BASH, Her Father and Next Friend, *Appellees.*

Appeal from the Supreme Court of the State of Illinois.

MOTION AND BRIEF OF AMICUS CURIAE: THE JOINT CONFERENCE COMMITTEE ON PUBLIC RELATIONS SET UP BY THE SOUTHERN BAPTIST CONVENTION, THE NORTHERN BAPTIST CONVENTION, THE NATIONAL BAPTIST CONVENTION INC., AND THE NATIONAL BAPTIST CONVENTION.

E. HILTON JACKSON,
Attorney for

The Joint Conference Committee on Public Relations Set up by the Southern Baptist Convention, the Northern Baptist Convention, the National Baptist Convention Inc., and the National Baptist Convention.

CHALLEN B. ELLIS,
W. D. JAMIESON,
KAHL K. SPRIGGS,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Appeal from the Supreme Court of the State of Illinois.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

To The Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, as counsel for The Joint Conference Committee on Public Relations set up by the Southern Baptist Convention, the Northern Baptist Convention, the National Baptist Convention Inc., and the National Baptist Convention, respectfully moves this Court for leave to file

the accompanying brief as amicus curiae. The Joint Conference Committee on Public Relations is appointed each year by the Conventions above mentioned. The activities of the Committee, among others, include the maintenance of religious freedom and the separation of church and state whenever in its judgment these principles are imperiled. Other activities of the Joint Conference Committee may be undertaken from time to time as may be suggested by its membership.

The issue presented in this case is the constitutional validity of a system arranged for by public school authorities under which sectarian religious instruction is conducted within public school buildings within regular school hours.

We have sought, but have been unable to obtain, the consent of counsel for appellees to the filing of this brief. Appellant's consent has been filed.

Dated: Washington, D. C., November 13, 1947.

E. HILTON JACKSON,
Attorney for

The Joint Conference Committee on Public Relations Set up by the Southern Baptist Convention, the Northern Baptist Convention, the National Baptist Convention Inc., and the National Baptist Convention.

CHALLEN B. ELLIS,
W. D. JAMIESON,
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STATEMENT.

This brief is filed on behalf of and by the authority of The Joint Conference Committee on Public Relations set up by the Southern Baptist Convention, the Northern Baptist Convention, the National Baptist Convention Inc., and the National Baptist Convention.

The Conventions mentioned maintain by voluntary support of their membership a large number of schools and

colleges in excess of 130, with a student body, including theological seminaries, of approximately 60,000.

It may be said that the interest of the Joint Conference Committee is specific, but also the issue is of vital concern to all religious groups calling for a pronouncement by this Court as to whether the factual situation presented constitutes an invasion of the time-honored doctrine of the separation of church and state safeguarded by the Constitution. The question is thus squarely presented here for the first time, whether a state may, consistently with the bill of rights of the Constitution, arrange for and carry out the teaching by various religious sects of their respective religious doctrines to public school children in the public school rooms during school hours.

FACTS.

A full statement of the facts, in detail, has been made in the brief for Appellant and the essential facts necessary to a decision, as we view it, are stated also in the opinion of the Court below (R. 268, 269). Since the principal fact upon which we rely is so simple and is undisputed, we deem it unnecessary to repeat here a detailed and separate statement of facts.

The outstanding fact is that, by arrangement with the Board of Education in the Champaign School District, an organized group or committee of several church organizations in the city took over the teaching of their respective creeds to the children who were attending public schools in that city and conducted such instruction in the school rooms during regular school hours for a certain period of time during the school week (R. 61, 65). This plan of having religious instruction in the public schools was carried out in cooperation with the parents of the public school children by having the parents designate the particular religious belief in which such teaching was desired, and the children whose parents did not desire such instruction, were segregated from the others but were required to remain

"at school" and they (as well as those who took such instruction) remained all the time under the jurisdiction and control of the public school authorities. (R. 61, 62, 65, 132, 175, 193, 255)

ARGUMENT.

Recent decisions of this Court involving the religious clause in the Constitution, have established certain principles in the interpretation and application of the First Amendment providing that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof":

First. It is now well established that the mandate of the First Amendment applies to the states as well as to the Federal Government; that the rights guaranteed in that amendment are of the kind protected by the Fourteenth Amendment which is applicable to the states and therefore that a law respecting an establishment of religion or prohibiting the free exercise thereof by any state would be a violation of the Federal Constitution (*Murdock* v. *Pennsylvania*, 319 U. S. 105, *Board of Education* v. *Barnette*, 319 U. S. 624 and several later cases).

Second. The "establishment of religion" provision is just as much a mandate to the states as the provision for "free exercise of religion" (*Everson* v. *Board of Education*, decided February 10, 1947, 330 U. S. 1).

Third. The First Amendment, now applicable to the states, is not limited to restrictions upon the exercise of religious liberty, but embraces aid in any form to religious organizations (*Everson case, supra*).

Fourth. The provisions of the First Amendment, both as to aid and restrictions, apply not alone to the churches or religious organizations but to other religious activities, including schools and other educational activities of religious bodies. The absolute separation of church and state

thus means that in states there must be that separation in the public schools operated by the states (*Everson case, supra; Board of Education* v. *Barnette, supra*).

To sum up, the Supreme Court in the *Everson case*, referring to the First Amendment and the growth of the doctrine of the separation of church and state in Virginia, said:

> "The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was *stripped of all power to tax, to support, or otherwise to assist* any or all religions, or to interfere with the beliefs of any religious individual or group." (Italics supplied)

And again:

> "* * * the question has most frequently arisen in connection with proposed state aid to church schools and efforts *to carry on religious teachings in the public schools* in accordance with the tenets of a particular sect * * * The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments." (Italics supplied)

The Court then speaks of the difficulty of drawing a line between *tax legislation* for the welfare of the public generally and tax legislation to support institutions which teach religion. But there was no hint of any difficulty in drawing the line between teaching religion in the public schools (or other participation of religious organizations in public institutions) and participation of public institutions in religious organizations. Indeed, the Court emphatically stated:

> "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."

From these decisions it seems to follow logically and inevitably that a commingling of religious teaching and secular

teaching, participated in by representatives of religious organizations and employees of the state in its public school system is a violation of the First Amendment, as it applies to the states.

We need not consider the various questions as to the course of study which may or may not be prescribed in the public schools, which have arisen in a number of states but which have no real application to the precise situation here presented. We are confronted here with the question of constitutional validity of state action (through local school boards) authorizing the conducting of religious exercises by ministers or representatives of religious organizations in the school rooms during school hours as part of the school session of such public schools.

As far as research has been able to develop, no state in the Union and no state court in the United States (except alone in this decision from Illinois), has sanctioned such a commingling of the affairs of church and state at any time since the adoption of the public school system. On the contrary, in the early cases where the question has arisen, the state courts have been emphatic in denying any such right under the fundamental provisions of the separation of church and state found in nearly every state constitution.

In an early case in Pennsylvania, *Stevenson* v. *Hanyon*, 4 Pa. Dist. R. 395, (quoted in *Knowlton* v. *Baumhover*, 182 Iowa 691) the Pennsylvania Court says:

> "*It is too plain for argument* that denominational religious exercises and instructions in sectarian doctrine have no place in our system of common-school education. They are not only not authorized by any law, common or statutory, but are expressly . . . forbidden by our . . . fundamental law of the commonwealth." (Italics supplied)

In *Knowlton* v. *Baumhover*, 182 Iowa, 691, it is said by the Iowa Court:

> "*If there is any one thing which is well settled in the policies and purposes of the American people* as a

whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used directly or indirectly for religious instruction, and above all that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed or belief.

"* * * We can and do hold in high respect the convictions of those who believe it desirable that secular and religious instruction should go hand in hand, and that the school which combines mental and spiritual training is best adapted to the proper development of character in the young. The loyalty to their professed principles which leads such persons to found and maintain schools of this class at their private expense, while at the same time bearing their equal burden of taxation for the support of public schools, is worthy of admiration and convincing proof of their sincerity. But it is doubtless true that this double burden (double only because voluntarily assumed) sometimes renders those who bear it susceptible to the misleading argument that because they thus carry an extra load for conscience's sake, there is something wrong in the policy which forbids them to make the public school a means for accomplishing the end for which the parochial school is designed. * * * But, as we have before intimated, the right of a controversy of this kind is not to be decided by a count of the number of adherents on either side. The law and one are a majority, and must be allowed to prevail. The spirit which would make the state sponsor for any form of religion or worship, and the religion, whether Protestant or Catholic, which would make use of any of the powers or functions of the state to promote its own growth or influence, are un-American; they are not native to the soil; they are inconsistent with the equality of right and privilege and the freedom of conscience which are essential to the existence of a true democracy."

Since, according to the principles announced by this Court in the *Everson case, supra,* neither a state nor the Federal Government can, openly or secretly, participate in

the affairs of any religious organizations or groups, and religious organizations or groups cannot participate in the affairs of the state or the Federal Government, and since establishment and maintenance of a public school system with compulsory attendance of pupils not attending private schools are clearly matters of state affairs, the question of constitutional validity of such co-mingling and participation as is shown in the case now before this Court seems to us to answer itself.

There could hardly be a more obvious participation by state and church authorities in the affairs of each other than the use of the public school system during school hours for religious teaching—not only religious teaching but also selection of particular sects of religion—and their joining by arrangement with and sanction of the public school authorities in teaching in the school rooms during school hours the doctrines of one or several particular sects of religion.

The important fact in considering the cooperation of church and state presented in this case is that the time involved, however short or long, is time when the children are required to be and are under the jurisdiction of the school board, acting by or through the Superintendent of Schools, or principal of the particular school and the place used is a place—the public school house—over which the school board has jurisdiction and control—not as custodian merely of public property but in its capacity of agent of the state furnishing public education by means of a public school system. At the time the children are offered or given Catholic, Protestant or Jewish instruction, they are in the care and custody, as it were, of the public school authorities, they are not on their own time or under their parents' care, free to absent themselves from school, without being truant and without accounting for their time to public authorities, and their attendance at school, whether in one room or another or in the hall, goes on as part of the regular school time which they are required to give to education and time for which they are credited in notation of their "school hours."

That they do not have to take part in the religious services or instruction being conducted is beside the point; they are held in school under the care of principal or other school authority; they are still public school pupils attending a public school during public school hours and the arrangement for this part of their school routine was made by the school board or other school authority, acting in its official capacity of taking care of the education, at the expense of the public, of the school children in the particular district, town or city. To say that the teachers of sectarian doctrines are paid for by the churches and not by the state or that the children are not compelled to attend religious instruction, ceremonies or services held in the school during the time they are required to attend and be present at school, misses the point of constitutional law with which we are dealing and merely "entangles in precedents" the fundamental question of separation of church and state.

However desirable may be the widespread teaching of religion to children, it seems "too plain for argument" that the public school system, with compulsory education laws, cannot be used for that purpose.

Respectfully submitted,

E. HILTON JACKSON,
Attorney for

The Joint Conference Committee on Public Relations Set up by the Southern Baptist Convention, the Northern Baptist Convention, the National Baptist Convention Inc., and the National Baptist Convention.

CHALLEN B. ELLIS,
W. D. JAMIESON,
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Of Counsel

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CHARLES ELMORE CROPLEY
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October Term, 1947

No. 90

PEOPLE OF THE STATE OF ILLINOIS *ex rel.*
VASHTI McCOLLUM,

Appellant

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT
NO. 71, CHAMPAIGN COUNTY, ILLINOIS, *et als.*,

Appellees

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF COUNSEL FOR AMERICAN UNITARIAN ASSOCIATION AS AMICUS CURIAE

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Appellees

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The undersigned, as counsel for the American Unitarian Association, respectfully moves this Honorable Court for leave to file the accompanying brief in the above-entitled case as *amicus curiae*. The appellant, but not the appellee, has consented to the filing of the brief.

EDWARD C. PARK,
Counsel for
American Unitarian Association.

Supreme Court of the United States

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Appellees

BRIEF OF COUNSEL FOR AMERICAN UNITARIAN ASSOCIATION AS AMICUS CURIAE

I.

Preliminary Statement

The American Unitarian Association is a religious society incorporated in 1825 under the laws of Massachusetts and has its principal office at Boston in that state. Its principal members are Unitarian churches located throughout the United States and Canada, and it exists for religious purposes, more particularly to serve Unitarian congregations and to aid them in the observance and extension of their faith.

It has an interest in the above-entitled proceedings by reason of the nature of the questions involved, the absolute separation of church and state being one of the cardinal principles of Unitarianism. The state rests ultimately upon the use of force, but from the Unitarian point of view the essence of religion is that it rests upon completely voluntary acceptance of ethical and spiritual beliefs and obligations. From the point of view of the Unitarian faith the only proper function of the state in connection with the church is to guarantee complete freedom in the realm of religion to individuals and to churches, by the use of force if necessary. Beyond this strictly limited function, which is basic in the American system, any action by the state constitutes an abridgement of the rights of the church.

We understand the case, most briefly stated, to be as follows:

James Terry McCollum, who was ten years old at the time the case arose, was required by the laws of Illinois to attend public school in Champaign County, Illinois, where he lived.

The appellee school district permitted pupils in the grade which the boy attended to be released from their secular studies for one-half hour a week if they volunteered to attend classes in religious education during that period. The classes in religious education were conducted in the school buildings, but otherwise without expense to the state or county. James was offered the same choice as other pupils, but as a result of parental instructions, he did not elect to become a member of the class in religious education, and was required to continue his regular studies during the half hour each week that other pupils were released.

The suit was by the mother of James, as a taxpayer in Champaign County, for a writ of mandamus to prohibit

religious education in the public schools while regularly in session. The petitioner also alleged that she was required by law to cause her son to attend the school.

We believe that for many ten-year-old boys, and perhaps for James, a choice between pursuing regular studies in public school and attending classes in religious education may be regarded as one between two evils. In any event, he was in substance, offered a release from compulsory attendance at public school only upon condition that he elect to pursue a course in religious education. He was in effect told that he must take such a course *or else* continue his regular studies. We think he was thereby constrained by public authority to attend the class in religious education. Moreover, as the record discloses, that constraint, though not absolute, became under the circumstances severe in that by not volunteering he was isolated from other pupils and singled out as a non-conformist.

It is our view that the principle of the separation of church and state should be maintained, and that the action of the School District violated that principle.

II.

Argument

The First Amendment, as made applicable to the states by the Fourteenth, prohibits state aid for any religious purpose.

Everson v. Board of Education, 330 U. S. 1.
Reynolds v. United States, 98 U. S. 145.

To coerce or influence pupils in the public schools to attend classes in religious education is obviously to aid religion.

While a state has undoubtedly power to constrain a minor child to attend a public school, if his parents are unable or unwilling to provide for his education elsewhere, that power can only be used for a proper public purpose. Clearly, a state may not require attendance at classes in religious education under penalties to be inflicted upon the child or his parents.

West Virginia State Board of Education v. Barnette, 319 U. S. 624.

To require a child to attend public school only upon condition that he has not volunteered to attend such classes is, we submit, to constrain or coerce his attendance. Clearly he is constrained when he is required to come to public school, though his restraint be legal if its sole purpose is a proper one. When, however, its purpose is an unauthorized one, or is either an authorized or in the alternative an unauthorized one, it cannot be justified.

A state may punish a minor child for violation of law, but a judgment of a juvenile court cannot include as one of the conditions of probation the requirement of attending Sunday School and Church for one year.

Jones v. Commonwealth, 38 S. E. 2nd 444 (Va.).

A state may levy an income tax to obtain revenue. But an exemption from tax granted to church goers would clearly be invalid. Resort to the taxing power to effectuate an end which is not legitimate is obviously improper.

United States v. Butler, 297 U. S. 1, 69.
United States v. Constantine, 296 U. S. 287, 296.

A fortiori, such resort may not be had where the object is within a constitutional prohibition.

It would be no answer to a challenge to the validity of a law exempting church goers from taxes that church doors were open to any one.

One law for those who are members of a religious organization and another law for those who are not would obviously violate the Fourteenth Amendment.

Re Summers, 325 U. S. 561, 571.

The regulations of the School District here involved seem to us to present a case of one law for James Terry McCollum and another for those of his classmates who volunteer to attend classes in religious education. He must go to school, while they are released.

Respectfully submitted,

EDWARD C. PARK,
Counsel for
American Unitarian Association
as Amicus Curiae.

FRANK B. FREDERICK,
Of Counsel.

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BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, ET AL.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Interest of American Civil Liberties Union

This brief is filed with leave of the Court. The American Civil Liberties Union, a non-profit, non-partisan organization, is devoted to protection and preservation of the fundamental freedom guaranteed all citizens of this country by Federal and State constitutions. It has a nationwide membership of persons of all religious views and sects, including citizens of Illinois.

It believes no human freedoms are more vital than those assured in the Federal First Amendment and reassured in the Bills of Rights of the State Constitutions. It believes in the basic, democratic American concept of separation of church and state in its broadest aspects and that neither Federal nor State Governmental agencies should be permitted, by laws or by acts, to breach; ever so slightly, the wall of separation.

By this brief we do not, expressly or impliedly, criticize religion or religious sects or private denominational schools. The problem here relates solely to religious freedom and the proper place for religious education.

We shall limit ourselves to a discussion of constitutional questions involved in conducting classes of public school children in sectarian religion in classrooms in public school buildings during regular school hours with the permission and cooperation of local school authorities. Certain other questions, not directly involved, are merely mentioned (see Point V).

Statement of the Case

Appellant, as a taxpayer and resident in Champaign School District No. 71, Illinois, where her son, James, attends school, sought by mandamus to require Appellee to prohibit teaching of religious education in the public schools in that District and in all public school buildings therein when occupied by the schools (1, 17*). She appeals from a judgment of Illinois Supreme Court affirming the denial of her petition by Circuit Court of Champaign County (60, 268).

In her petition, Appellant invoked, as violated, the First and Fourteenth Amendments of the United States

* References are to page numbers of Transcript of Record unless otherwise indicated.

Constitution, provisions of Illinois Constitution (Art. II, Secs. 2, 3; Art. VIII, Secs. 1, 3) and various Illinois statutes (Ill. Rev. Stat. 1943, Ch. 122, Secs. 286, 123, 122; Ill. Rev. Stat. 1939, Ch. 122, Secs. 136, 122, 297a and Ch. 38, Sec. 128k), which she quotes (2, 4, 10-11, 13-15). She specifically alleged violation of the principle of separation of church and state (8). These questions were passed on by the Illinois Courts (71-3, 270-9). The essential facts bearing on questions discussed herein seem not in issue.

Religious education classes for public school pupils have been established and maintained for several years in the public school buildings of Champaign, Illinois, during regular school hours under arrangements made between Appellee, Board of Education, and "The Champaign Council of Religious Education", a religious organization made up of representatives of Roman Catholic, Jewish and some Protestant faiths (40-2, 61, 268).

Appellee granted permission for and agreed to cooperate with the plan of said Council for such religious teaching in School District No. 71, which includes all public schools and school buildings in Champaign. This action was taken at a regular meeting on June 6, 1940, and was recorded in minutes of the Board (127-9). Appellee delegated to the Superintendent of Schools the making of all arrangements and the supervision of the religious education program (127-8, 130).

The Council consists of churchmen, lay and clerical, who sought permission of the School Board for and are interested in promoting teaching of religion in the Champaign public schools. It is financed by churches. Not all denominations are represented—only about six of the larger Protestant denominations (92, 129, 156-7, 159). Some oppose the plan (187-8, 216).

The record describes this Champaign plan, as conceived and operated. Public school teachers distribute to pupils "Parents' Request Cards" (176) for parents to sign requesting permission for their children to attend religious education classes. Thereon they check the class desired—"Interdenominational", "Protestant", "Roman Catholic" or "Jewish"—and also indicate "Parents' Church". When returned to the school teachers these cards are given to the religious teacher (94, 175-6, 130, 133, 145, 147-8, 253).

Teachers of religion are not public school teachers but are selected by or through the Council or its constituent denominations and are sent into the schools. The religious work in the schools is directed by a Protestant religion teacher. She makes detailed arrangements with the school principals and teachers for the conduct of religion classes. Protestant teachers are paid by the Council. Catholic and Jewish teachers are not. Religious teachers are subject to approval by School Superintendent (91-3, 109, 127, 130, 150-7, 40-1, 44).

Some 35 religion classes are conducted in Grades 4 through 9 for 30 minutes a week in elementary schools and 50 minutes a week in junior high schools, in regular classrooms in school buildings during regular school hours at various times throughout the school day (91, 110-12, 132, 137, 147).

Protestant courses are taught by two teachers (91, 137). When the religion teachers enter the classrooms, pupils not taking the course leave with their school teacher, going to the office, rest room, library, recess room, music room, science room or hall or into the class of another teacher where they devote their time to regular studies. Appellant's son was required to do this. They cannot play or leave the building (92, 110-13, 114-5, 132-3, 137, 148,

254-7, 260-3). If the religious class is large it remains in the regular classroom and the others withdraw; if small, the religious class moves into another room (120, 137, 147-8). Sometimes, school teachers stay in their classroom during the religious teaching (92, 132-3, 137).

No Jewish or Catholic child attends Protestant classes, and vice versa. Protestant, Jewish and Catholic groups in the Council have their own curriculum, finance and personnel committees which act largely independently. Each group selects and prepares its own teaching material, oral and written (93, 156-7, 226, 93).

Protestant teachers use outlines, selections and compilations based on the King James Bible, and other sources, comment on and explain Bible passages, tell religious stories, teach lessons regarding "Faith", conduct examinations and play "Biblette" games (11-13, 49-50, 97-104). Cards, pictures, books, textbooks and mimeographed material are used (223, 101, 140). The saying of prayers is taught and prayers are learned and recited in class (102, 141). Some of these teachings are out of harmony with beliefs of other Protestant denominations and of Catholics, Jews, Rationalists, Free Thinkers (121, 124-5, 130-1, 148-50, 168, 217-22).

Catholic students are taught in a separate room by a priest, dressed in clerical garb, in conformity with Catholic doctrine and the Douay Bible (91, 51, 105, 150-1, 226). Jewish classes, held until two years ago, were taught under a rabbi in accordance with Judaism and the Old Testament (105, 224, 228-30). Lutherans too would teach their own faith if arrangements could be made (121-2).

Appellee concedes there are differences in creed and beliefs between those groups already engaged in this religious education program (123).

The Superintendent issues school bulletins advising teachers and principals to work out programs for religious courses with the religious teachers, which is done (111, 117). Schedules given students from principals' offices show rooms designated for religious education (153). The school issues printed schedules to junior high school students on which they note an election to take "religious education" (233-4). Religion teachers make attendance reports to Superintendent (238).

Religious teachers use, without charge, regular school classrooms, blackboards, chairs, desks, tables, light and heat (133-4). "Request cards" were mimeographed in a school office by a clerk paid by Appellee (117, 197, 240).

The Superintendent says the schools are open to all denominations, but the School Board has an "unwritten reservation" that religion teachers must teach "properly" and in proper English; and he has given no thought to whether the schools can provide space for all denominations to teach during school hours (118-9).

The classes previously were taught in churches and if religious teaching in the schools is prohibited they will go on anyway, regardless of where they are taught (158, 226).

Appellant is a "Rationalist", disbelieving the religious teaching of Protestant, Catholic and Jewish faiths (208). She opposes the Champaign system as being undemocratic, calling attention in public to differences in creed and race, beyond the competency of public schools and defeating the constitutional principle of separation of church and state. Her protests, before suit, went unheeded (193-5, 201, 211, 15-6).

POINT I

The teaching of sectarian religion by religious teachers to public school students in public school buildings during school hours violates the First Amendment of the Federal Constitution as applied through the Fourteenth Amendment and the basic doctrine of separation of church and state inherent therein.

We respectfully submit that the action of the Appellee Board of Education, in permitting and in aiding and cooperating in the teaching of sectarian religion to pupils of public schools in school buildings during regular school hours by religious teachers sent in for that purpose is a clear violation of the fundamental American principle of separation of church and state and the constitutional prohibition respecting an establishment of religion.

Appellee's action is an act legislative in character given sanction by the State. (*Hamilton* v. *Board of Regents*, 293 U. S. 245.)

The First Amendment of the Federal Constitution as read into the Fourteenth Amendment, makes invalid any State law "respecting the establishment of religion or prohibiting the free exercise thereof." *Everson* v. *Board of Education*, 330 U. S. 1, 8, 5, 15.

The States and all their agencies are as incompetent as Congress to enact laws or give sanction to acts legislative in character which are in conflict with the prohibitions of the First Amendment. They cannot, through school policy, invade these rights secured to every United States citizen. (*Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Douglas* v. *Jeannette*, 319 U. S. 157, 162; *Murdock* v.

Pennsylvania, 319 U. S. 105, 108; *Board of Education* v. *Barnette,* 319 U. S. 624, 637, 639; *Everson* case, Jackson, J., at pp. 21-2.) Boards of Education must observe these constitutional limitations. (*Barnette* case, *supra,* at p. 637, overruling *Minersville District* v. *Gobitis,* 310 U. S. 586).

No mere issue of "educational policy" is involved here and this Court does not have to become "the school board for the country" to insist that local school authorities and school legislation conform to constitutional limitations. When liberty is infringed in public education, this Court will act. (Cf. *Gobitis* case, *supra,* at p. 598; *Barnette* case, *supra,* at pp. 637, 640, 642.)

The freedoms of religion in the First Amendment are in a preferred position and may not be infringed on slender grounds. (Cf. *Barnette* case, *supra,* at p. 639; *Murdock* case, *supra,* at p. 115.) The freedom involved here was first in the Bill of Rights because it was first in the minds of our country's forefathers. (Cf. *Everson* case, Jackson, J., *supra,* at p. 26.)

The purpose of the religion clause of the First Amendment, as viewed in the light of its generating history, is manifest. It was designed to bring about the complete separation of church and state—to keep religion outside the sphere of political government. That doctrine is cardinal in the history of this nation and for the liberty of our people. (Cf. *Barnette* case, *supra,* Frankfurter, J., at pp. 654-5.) It was and is an American doctrine, not one of foreign importation. It was a "new world" idea, born in revolution and out of the age-old, bitter, unceasing turmoil and strife between church and state in the Colonies and abroad.

The problems of today were fully known and experienced in essentially similar manifestations in our Colonial

history and had led, after a century-and-a-half struggle for religious freedom and the separation of church and state, to the framing and adoption of the First Amendment. Jefferson characterized this struggle as the "severest contests in which I have ever been engaged" (Jefferson Autobiography, Vol. I, pp. 53-9).

The background history was sketched in our brief in the *Everson* case. It has been set forth fully in the opinions there. It need not be repeated. This principle was embodied, not only in the Federal Constitution, but in the various State Constitutions, including that of Illinois, and examination thereof proves that nothing has been more plainly or resolutely expressed than the determination of the citizens of the States and of the United States to preserve and perpetuate religious liberty and the separation of church and state, and to guard against the slightest approach toward infringement thereof.

Although this Court's decision in the *Everson* case has created controversy and misgivings in its application of the broad principles to the facts there, it did sum up quite clearly the principles underlying this clause of the First Amendment. In respects material here, it stated:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government * * * can pass laws which aid one religion, aid all religions, or prefer one religion over another. * * * No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against estab-

lishment of religion by law was intended to erect 'a wall of separation between church and State.'" (At pp. 15-16.)

* * * * * * *

"* * * That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers * * *. State power is no more to be used so as to handicap religions than it is to favor them." (At p. 18.)

* * * * * * *

"The people there (in Virginia), as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group." (At p. 11.)

The Court said (at p. 15) there is every reason to give the same application and broad interpretation to the "establishment of religion" clause as has been given by this Court in its decisions concerning an individual's religious freedom and it added as to the interrelation of these complementary clauses:

> "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."

The issues here can and should be resolved against Appellee on the principles thus stated. But the discerning statements of the dissenting justices also demand attention. The split in the Court seemingly was not in basic principles but in applying the principles to the facts.

Mr. Justice Jackson certainly was correct in asserting that the effect of this Amendment "was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense", and that "it was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life" (at pp. 26-27).

Mr. Justice Rutledge was equally right when he stated:

> "The Amendment's purpose . . . was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion (at pp. 31-2).
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> The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes" (at p. 33).
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> "The reasons underlying the Amendment's policy have not vanished with time or diminished in force. . . . There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Pars. 6, 8" (at p. 53).

The public schools of this country, including those of Illinois, are set up and governed by the civil authority. They are temporal institutions. School boards are civil, state agencies.

Historically, the principle of separation of church and state was carried over into the field of education. The

same spirit that manifested itself in opposition to state control or support of religion directly likewise bred opposition to state support of sectarian schools. If education was to be religious, it must be carried on by the churches and without the support of the state. With the demand for an educational system supported by the state came a similar demand that such education be non-sectarian.[1]

Our public school is a relatively recent development, dating from about 1840. It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. (*Everson* case, Jackson, J., at p. 24.) The strife among the religious sects, the struggle of each denomination to impose its theological beliefs on the school youth, the public resistance, the demands of labor and the spirit of Jacksonian democracy, all combined to give effect to the demand for general public schools which would be free, tax supported and non-sectarian.[2]

The Courts repeatedly have recognized the secular character of public schools. Just recently in *City of New Haven* v. *Town of Torrington*, 132 Conn. 194, 43 Atl. (2) 455, it was said:

> "There are two essentials that must be present to constitute a school a public school. It must remain under the exclusive control of the state through the state's constituted agencies, and it must be free

1. Johnson, *"The Legal Status of Church-State Relationships in the United States"*; Univ. Minn. Press, 1934, pp. 15-22, 152.

2. Beard "The Rise of American Civilization", pp. 810, 813; Cubberley, Public Education in the United States (1934) ch. VI; Knight, Education in the United States (1941) ch. VIII.

from sectarian instruction * * *. The principle is implicit in all public school systems that they must be under public control and secular in instruction."

Judd v. *Board of Education*, 278 N. Y. 200, 210-11:

"While a close compact had existed between the Church and State in other governments, the Federal government and each State government from their respective beginnings have followed the new concept whereby the State deprived itself of all control over religion and has refused sectaries any participation in or jurisdiction or control over the civil prerogatives of the State. And so in all civil affairs there has been a complete separation of Church and State jealously guarded and unflinchingly maintained. In conformity with that concept, education in State supported schools must be non-partisan and non-sectarian. This involves no discrimination between individuals or classes. It invades the religious rights of no one. Denominational religion is merely put in its proper place outside of public aid or support."

So too in Illinois (*People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 349), it was said:

"The public school is supported by taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay. The school, like the government, is simply a civil institution. It is secular, and not religious, in its purposes."

This Court (*Barnette* case, *supra*, at p. 637) said:

"Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction."

Education in public schools under this Champaign plan is not secular or non-sectarian. It is an admixture of secular and sectarian. Appellee admits, as to the religion taught, there are differences in creed and belief between those already engaged in this religious education program, including Jewish, Catholic and various Protestant faiths (123).

The record shows the character of religious courses given there (5-7, 11-13, 66-7, 93-105, 139-144). The nature of teachings and material used in Jewish and Catholic classes does not appear, except they accord with their respective faiths, the Jewish groups denying divinity of Christ and the Catholic classes teaching Catholic doctrine.

Protestant courses teach material selected and approved by the several dominant Protestant denominations in the Council, including Methodists, Presbyterians, Episcopalians, Baptists, Disciples of Christ and Congregationalists (92, 129).

Quite clearly, the Protestant teachings are inconsistent, in a number of respects, with doctrines and beliefs of Catholicism and Judaism and of other Protestant denominations such as Lutherans, Quakers, Christian Scientists, Unitarians, Jehovah's Witnesses and Interdenominationalists and entirely inconsistent with those of Rationalists and Free Thinkers (121, 124-5, 130-1, 148-50, 168, 217-22, 229-30). Protestant teachers teach the divinity and messiahship of Jesus, the resurrection of Jesus, the miracles, faith healing, the foretelling of future events by prophets, the everlasting life, the resurrection of the body, the efficacy and power of prayer, baptism, salvation, the Bible is the Word of God, et cetera.

Instruction in any of such subjects is necessarily sectarian, because, while it may be consistent with the

doctrines of one or more sects, it will be inconsistent with the doctrines of others. The Bible itself is a sectarian book to non-Christians and certain versions thereof are regarded as sectarian books by different Christian denominations. This was recognized in *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 92 N. E. 251, *supra*.

The Bible contains innumerable passages which are doctrinal and upon which particular creeds of various religious sects are based. Sectarianism has resulted from the infinite variety of differences of opinion regarding the truth, authority, emphasis, meaning and interpretation of Biblical passages. Each sect, as it has arisen, has assumed that it alone possesses the revelation and the truth. The process of religious schism has been going on continuously for ages, and continues. These differences and objections may seem light and trivial, but history has been made over the controversies that have arisen from them. (See *People ex rel. Dearle* v. *Frazier*, 102 Wash. 369, 376; 173 Pac. 35; *State ex rel. Weiss, et al.* v. *District Board*, 76 Wis. 177, 194-5; 44 N. W. 967.) The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree, and they, therefore, fashioned a charter of government which envisaged the greatest possible toleration of conflicting views. (*U. S.* v. *Ballard*, 322 U. S. 78, 87.)

Obviously, the public school is not the proper place for sectarian teachings. As was said in *People ex rel. Ring* v. *Board of Education, supra* (at p. 349): "Religion is taught, and should be taught, in the churches, Sunday schools, parochial and other church schools and religious meetings. Parents should teach it to their children at

home, where its truths can be most effectively enforced." (To the same effect, see *State ex rel. Weiss, et al.* v. *District Board, supra,* at p. 202; *Stein* v. *Brown,* 125 Misc. (N. Y.) 692, 697.)

Parents who desire their children to have sectarian education need not rely and cannot impose upon the public schools for it. The church and the home are free to teach and practice religion. Parents have the right to send their children to sectarian schools, even against an assertion of state power which would try to compel all children to attend public schools. (*Prince* v. *Massachusetts,* 321 U. S. 158, 165; *Pierce* v. *Society of Sisters,* 268 U. S. 510.) Such child has the same right as any other to attend public school. The same guaranty which assures this freedom forbids the public school or any agency of the State to give or aid the child in securing the religious instruction he seeks. Were such a child to accept the public school, he would be the first to protest the teaching there of any creed or faith not his own. It is precisely for the reason that their atmosphere is wholly secular that children are not sent to public schools under the *Pierce* doctrine. But that is a constitutional necessity, because we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion (*Everson* case, *supra,* at p. 59, Rutledge, J.).

A parent has no more right to request the state to enter into the realm of religion in education, for the sake of the child, than the state has to request the parent to depart from that realm for the same reason.

Nothing in this record indicates that this plan of religious education in public schools was conceived or demanded by the parents of the school children. Rather,

it was inspired and promoted, sincerely no doubt, by a group of ministers and church laymen who organized the Religious Council and sought the approval and cooperation of the School Board for their plan (92, 128).

The School Board not only gave permission but has cooperated and assisted in carrying the plan into effect. It has been made part of the public school program. All arrangements were made by the Superintendent to whom supervision of it was delegated. The Superintendent, and all the principals and teachers at his request, have been cooperating in carrying out the plan.

The logical ends of this Champaign plan show the error of its beginnings. While the Superintendent testified the school buildings are available to all religious denominations when they are being used by students, with permission of the Board, he had "not given any thought to whether the schools can furnish sufficient space for all denominations to teach during school hours" (119).

If any denomination is given the privilege of thus using the schools, every denomination must be extended that privilege. If this plan is upheld as constitutional for Champaign it must be approved for school districts everywhere, including the largest school districts in metropolitan areas where live folk of every race, creed, color and national origin.

The Federal Census of 1936, which was incomplete, reported 256 religious denominations in continental United States alone. There are probably many more. A study of the number and variety of these sects and of the doctrines and beliefs peculiar to each one is a revelation. It shows that the religious history of the United States is an ecclesiastical fecundity carried to a point which must distress any theologically minded Malthus. About

52 of these religious bodies have 50,000 members or over.[3] A recent book[4] contains a revealing study and shows the extremities in beliefs of eight of the most significant, little-known religious groups in America, said to represent what 15,000,000 of our citizens believe and practice, to wit: Jehovah's Witnesses, The Four-Square Gospel, Spiritualism, Oxford Group-MRA, Kingdoms of Father Divine, The Baha'i Faith, Unity and Psychiana.

Suppose all or any number of the 256 Christian sects, including said eight more unorthodox groups, as well as numerous non-Christian religions, were to seek to teach their faiths in the public schools. The beliefs of most of them are so diverse, each would need a separate classroom. None could be excluded without discrimination. Under one public school roof we would have Jehovah's Witnesses denouncing Protestants and Catholics and teaching opposition to the flag salute (Cf. *Cantwell* and *Murdock* cases, *supra*), Christian Scientists teaching the futility of medical practices, Quakers teaching pacifism, Spiritualists giving or teaching spirit messages and Father Divinites teaching the reappearance of God on earth. Religious instruction would be based not merely on different versions of the Bible—Protestant, Catholic and Jewish—but on the various sacred books of the East and on some of our native sacred books, such as "Book of Mormon" and "Science and Health with Key to the Scriptures" and "Watchtower."

The public school houses during school hours would become a bedlam of sectaries and a Babel of religious

3. See U. S. Dept. of Commerce, Bureau of Census, Report on Religious Bodies 1936; Yearbook of American Churches (Landis 1943); "Religion in America" by Dean Willard L. Sperry (Macmillan Co. 1946), especially Chapters V and VI on "The Denominations" and appendices.

4. "They Have Found A Faith" (Bobbs-Merrill Co. 1946), Prof. Marcus Bach of Iowa Univ. School of Religion.

tongues, spawning discord, intolerance, bigotry and hatred. They would be flooded with sectarian publications, crowded with religious teachers, many in clerical garb. Pupils would be classified and segregated according to their diverse beliefs or lack of belief. There would not be enough rooms to hold all the classes. The public school system for all practical purposes would cease to exist and its ideal of secular education would be a mockery.

In principle there can be no essential difference between a public school where secular and sectarian education is taught and a denominational school where sectarian and secular education is taught. By such commingling the line historically separating public schools from private, religious schools becomes blurred beyond recognition. It is all "religion" (cf *Everson* case, *supra*, p. 33).

The commingling and unification of sectarian and secular education in public schools has been attempted before in this country in various forms, guises and degrees, and no doubt will become widespread should this Court approve this latest breach. The Champaign plan is merely the newest form of commingling, but involves the same violation of basic principle. Supreme Courts of various states having constitutional and statutory provisions similar to those in Illinois, have adhered to the principle and refused to sanction such commingling. (See *People ex rel. Ring* v. *Board of Education, supra; People ex rel. Dearle* v. *Frazier, supra; State ex rel. Weiss, et al.* v. *District Board, supra; Knowlton* v. *Baumhover*, 182 Iowa 691; 166 N. W. 202; *Harfst* v. *Hoegen*, 349 Mo. 808; 163 S. W. (2) 609; *Williams* v. *Bd. Trustees Stanton C.S.D.*, 173 Ky. 708; 191 S. W. 507; *Herold* v. *Parish Board of School Directors*, 136 La. 1034; 68 So. 116; *State*

v. *Scheve*, 65 Neb. 853; 91 N. W. 846; 65 Neb. 876; 93 N. W. 169; Cf. *Smith* v. *Donahue*, 202 App. Div. (N. Y.) 656, 660.)

In those cases, the Judges, who have written the pioneer opinions in this field, exhibited great wisdom and clear vision. It would unduly lengthen this brief to discuss the facts of each case or to quote the many excellent statements therein. We note merely a few.

The *Ring* case, *supra*, stated:

> "The public schools are supported by taxation, and if sectarian instruction should be permitted in them, the money used in their support would be used in aid of a sectarian purpose. (p. 340)
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> * * * * * * *
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> "The only means of preventing sectarian instruction in the schools is to exclude altogether religious instruction, by means of the reading of the Bible or otherwise." (p. 348)

Knowlton v. *Baumhover*, *supra*, asserted:

> "If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used, directly or indirectly, for religious instruction" (p. 704).

State v. *Scheve*, *supra*, stated:

> "The teaching of religion would mean teaching the system of faith and worship of one or more of the religious sects; it would mean sectarianism in the

> public schools, and to put sectarianism into the schools would, according to the opinion prevailing when the constitution was ratified, be to put venom into the body politic." (p. 879)

People ex rel. Dearle v. *Frazier, supra,* stated:

> "To compromise opinion in these matters is to lead to confusion which would make the courts the arbiter of what is and what is not religious worship, instruction, or influence, which would be as intolerable to the citizen as it would be to leave a decision to a school board." (p. 381)

These cases can be distinguished in detailed facts but not in principle. Whatever the form or degree, all involve efforts to inject sectarian religion into public schools. It is of no materiality that the pupil may be excluded or excused from participation in the sectarian instruction. If the instruction is such that certain pupils must be excused or segregated because it is hostile to their or their parents' beliefs then such instruction is sectarian and forbidden by the Constitution. (See the able discussions on this point in the *Ring, Herold, Weiss, Harfst,* and *Knowlton,* cases, *supra.*)

Manifestly, we believe, the action of the Champaign School Board violates the principles underlying the First Amendment. Appellee's action aids one or more religions and if carried to its logical conclusion, would aid all religions. So far as the Board accords special permission to the religions represented in the Religious Council and places conditions in the administrative process on other religions and their teachers, it prefers one religion over another.

The State of Illinois, through this school system, is not being neutral in its relations to groups of believers

and non-believers. It is using its civil power to favor religions and particular religions. It is supporting and otherwise assisting some or all religions and religious activities. It has failed to rescue the temporal institution of the public school from religious interference. It has made man's relation to his God the concern of the State. It has made public business out of private business. It has fused spheres of religious activity and civil authority.

The Constitution and statutes of Illinois, which are similar to those found in many other States (see Appendix annexed hereto), explicitly and firmly express the determination of its citizens to adhere to the principles mentioned above. Its free schools were organized as places where its children could receive a good "common school education". Attendance thereat is not required by children desiring a private or parochial school education. The free exercise of religion, without discrimination, is guaranteed; no person is required to support any ministry against his consent; no preference is to be given by law to any religious denomination and no civil right is to be denied on account of religious opinions.

No School District can ever make any appropriation or pay from any public fund whatever, anything in aid of any sectarian purpose or to help support or sustain any school controlled by any sectarian denomination; and no grant of land, money or personal property can be made by a School District for any sectarian purpose. School Districts are permitted to grant temporary use of school houses for religious meetings and public schools only "when not occupied by schools".

The Constitution and statutes are clear enough in their terms and purposes and spell out a complete and uncom-

promising separation of church from state. It is the Illinois courts that have swerved from the path and have attempted by judicial decision to amend or change the fundamental state laws. But if the Illinois statutory and constitutional provisions have been correctly construed by its Supreme Court which sustains the validity of the practices involved here, they are in direct conflict with the supreme law of the land as embodied in the Federal Constitution.

POINT II

The use, directly or indirectly, of public funds for purposes of sectarian instruction is in violation of said constitutional provisions.

The Illinois courts found no "direct" appropriation or expenditure was made by Appellee for or on behalf of said religious education classes, but "to some slight extent" Appellee "has indirectly appropriated public funds for the use of these classes, by the furnishing of rooms in public school buildings, light, heat, janitor service, and so forth" (69-70, 275).

The record shows not only that the School Board made available school rooms, furnishings and utilities for about 35 religion classes every week, but that the schools printed schedules and mimeographed cards and bulletins and conducted correspondence in connection therewith; also, that Superintendent, principals and teachers spent some of their time supervising and arranging for these classes and attending said classes or taking care of the students excused therefrom and in keeping and handling cards and records incidental thereto, all of which time otherwise would be spent on the regular secular activities

of the schools. Their time is paid for by the School District. These sectaries are saving expenses for class facilities at the taxpayers' expense.

Obviously, a proportionate share of Appellant's taxes are being used to support these schools and to aid and assist the conduct of religious instruction therein. That instruction is contrary to Appellant's own beliefs and tinges the public schools with sectarianism. Appellant urged this to be an improper use of public funds in violation of the Federal Constitution, and also of the Illinois Constitution and statutes specifically providing that no person should be required to support any ministry against his consent, that no School District shall pay from any public fund "anything" in aid of any sectarian purposes or donate land, money or personal property for any sectarian purpose (Ill. Const. Art II, Sec. 3; Art. VIII, Sec. 3; Ill. Rev. Stat. 1943, Ch. 122, Sec. 286).

Since the public schools are supported by taxation, money used for their support is used in aid of a sectarian purpose if sectarian instruction is permitted in them. And the prohibition of such use of public funds is therefore a prohibition of the giving of sectarian instruction in public schools (*People ex rel. Ring* v. *Board of Education, supra*, at p. 340; Cf. *Everson* case at pp. 44-7).

The Supreme Court of Illinois dismissed the point on the maxim *de minimis non curat lex*. These practices seemingly violate said state laws. They clearly violate the First Amendment.

The First Amendment, as read into the Fourteenth, has stripped government of all power to tax, to support or otherwise to assist any or all religions. No person, either believer or non-believer, can be taxed to support a religious institution of any kind. "To compel a man to furnish contributions of money for the propagation of opinions

which he disbelieves is sinful and tyrannical" (Virginia Statute of Religious Freedom). No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt, to teach or practice religion. Illinois and its agencies cannot consistently with the "establishment of religion" clause contribute tax-raised funds to support institutions, such as these public schools, which teach the tenets and faith of one or more denominations (*Everson* case, pp. 11-13, 16).

As Mr. Justice Jackson said in the *Everson* case, *supra*, (at p. 27) religious teaching cannot be a private affair when the State seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all; and as Mr. Justice Rutledge stated (at pp. 32-3, 40-1, 44-5, 48-9) the prohibition is against state support, financial or other, of religion in any guise, form or degree and all use of public funds for religious purposes. It is not the amount but the principle of assessment that is wrong. Madison said not even a "three pence" contribution, meaning a nominal amount, was to be exacted from any citizen for any such religious purpose. Whether the use or aid is large or small, direct or indirect, is immaterial and merely a matter of degree.

The prohibition against exacting money from a person for the dissemination of religious opinions contrary to his beliefs is absolute for whatever measure brings that consequence and whatever amount may be sought or given to that end. A taxpayer who embraces no creed or a different creed should not be forced to pay taxes for aiding religious teaching in which he does not believe. The matter is not one of quantity to be measured by the amount of money expended.

The Illinois courts recognized the assessment but evaded the constitutional principle on the ground that the assessment was too trifling for their notice. We believe, with Madison, that nothing is too trivial or indirect when its disregard involves a violation of basic constitutional principle.

It will be a sad day in our history if and when courts of final jurisdiction apply the *de minimis* maxim in evasion of the principle of separation of church and state and other basic freedoms.

A small exaction and use begets a larger exaction and use and an indirect use of public funds is soon followed by a more direct use thereof. This is obvious from a study of history and of prior state legislation and decisions (cf. *Thomas* v. *Collins*, 323 U. S. 516, 543; *Everson* case, at pp. 48-50).

In other cases involving a commingling of secular and sectarian education in public schools and similar constitutional and statutory provisions, state courts have prohibited such types of aid and support. (Cf. *People ex rel. Ring* v. *Board of Education, supra*, *Knowlton* v. *Baumhover, supra*; *Harfst* v. *Hoegen, supra*; *Williams* v. *Bd. Trustees Stanton C.S.D., supra*; *People ex rel. Dearle* v. *Frazier, supra*; *State ex rel. Weiss, et al.* v. *District Board, supra*; *Judd* v. *Board of Education, supra.*)

As was said in *Harfst* v. *Hoegen, supra*, at page 817:

> "The constitutional policy of our State has decreed the absolute separation of church and state, not only in governmental matters but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise."

An appropriation which would be unlawful by direct action may not be lawfully accomplished by indirection. If so, circumvention would attain a new use.

POINT III

The action of the School Board cannot be justified on the theory that it constitutes public welfare legislation.

In the *Everson* case, the act of a public school board (composed largely of parents of parochial school pupils) in using public funds for transportation of school district children to both public and Catholic parochial schools was justified on the ground it was "public welfare" legislation. In our brief for rehearing, we expressed grave concern lest such rationalization would lead to further breaches.

The Federal Constitution was established by all the people of the land to "insure domestic Tranquility" and to "promote the general Welfare" and to secure the blessings of liberty to posterity (Preamble). It could not have been adopted without the promised inclusion of the Bill of Rights.[5] The First Amendment is in promotion of the "general welfare" of the entire country, which transcends any public welfare of local States or school districts. The rights of all United States citizens should not be curtailed on the theory that that is necessary for the public welfare of one State's citizens. What is involved here is a "national right, federally guaranteed." (Cf. *Thomas* v. *Collins, supra*, at p. 543.) Any construction of the First Amendment which exempts what is called "public welfare legislation" for a State may be

5. "The Making of the Constitution", Charles Warren (1937, Little Brown & Co.), p. 510.

readily turned into an instrument disruptive of the "domestic tranquility" and the "general welfare" for which the Federal Constitution was ordained.

There is nothing in the testimony of the school officials here to indicate what motivated their action.

A clergyman connected with the Religious Council said the religion classes conducted in churches were not "accessible to a sufficiently large percentage of children of school age" and could be made more accessible if held in school buildings. He suggested the Council was interested in problems of juvenile delinquency, and thought its plan was in line with the general spirit of American democracy and religious tolerance (158-160).

However, the Council's President stated, the stopping of religious teaching in the schools would not be of any particular concern because the courses would go on anyway regardless of where taught (226).

Manifestly this plan was motivated by a desire of the Council to extend the field of its religious education from churches into public schools so more children could be reached. Implicit is an admission that the churches had failed to attract children. They realized that religion classes would be better patronized if held under the sponsorship of the school authorities and in schools where children were under compulsion to attend. Churches realize the value of early indoctrination (cf. *Everson* case at pp. 22-3, Jackson, J.). But churches, jointly or severally, can conduct religion classes on their own property after public school hours and on non-school days, such as Saturdays, Sundays and vacations and parents desiring such religious instruction for their children can send them to such classes freely or to a sectarian school.

Certainly, the injection of sectarian religion classes in public schools for some pupils whose parents desire them to have such education is not in the interest of the public generally and cannot possibly be regarded as "public welfare legislation" in any sense. It would be just as logical for school districts, in the "public welfare", to support and assist denominational schools in which pupils receive religious and secular education.

Religion is not a civil function or a public matter. An education which includes religious teaching is a private matter and function. We think this case emphasizes the fallacies and dangers inherent in the "public welfare-public function" thesis, as pointed out by the minority in the *Everson* case (pp. 19-21, 49-58).

Practically every effort by states and their agencies to break down the wall separating church from state is justified, at least in words, on the ground that it is in aid of the general public welfare or of some broad phase of the police power. History teaches that there have been few infringements of liberty by the state that have not been justified in the name of righteousness and the public good. (*Gobitis* case, *supra*, p. 604, Stone, J.) The real purpose is always glossed over and screened. That is apparent from a study of State statutes and decisions in this field. The approach seldom, if ever, is direct. It is invariably indirect. One rationalization leads to another. The time to stop the encroachment is when it starts. Compromises of principle invariably lead to confusion and more difficulties. An approval of the Champaign plan would seriously interfere with the general welfare and tranquility of the whole country.

POINT IV

Other violations of religious freedom are involved in this Champaign plan.

This plan, we believe, also conflicts with that part of the First Amendment which prevents school boards from interfering with free exercise of religion.

(1) Under this plan the School Superintendent becomes, in effect, a religious censor. While the schools are said to be open to all denominations, no sect or sectarian teacher can enter without the approval of the Superintendent. Applications to teach religion must be cleared through him. Number of pupils involved and location of their schools are criteria for approval. Supervision of religious education is delegated to him to "avoid conflict in the use of the schools" and "between the different denominations". It is his decision whether the schools can furnish sufficient space for all denominations, or any particular denomination, to teach during school hours. Religious teachers are not selected, as regular teachers are, on merit or on tests conducted by public authorities, but by the Religious Council. They are subject to his approval but there is an "unwritten reservation" that all religion teachers will teach "properly" and "in proper English". He is the "last word" (127). The plan's avowed policy is to prevent the use of "controversial or antagonistic" material.

On any of these grounds the Superintendent, on his own initiative, can exclude denominations. The effect is a religious censorship in him. Obviously, it is not possible for the various sects, if faithful to their own beliefs, to teach without using matter considered controversial

or antagonistic to other sects. This is not being done now by the Protestants, Catholics and Jews. All sects may not have teachers whose English is entirely satisfactory to a School Superintendent.

Membership in religious sects is not based on literary tests or teaching skills. Zeal, faith and belief are required. The Superintendent need not have arbitrarily exercised this power. The fact that he is authorized to decide the ultimate issue and to refuse access to the schools to certain denominations, for one such reason or another, is enough to invoke the protection of the First Amendment. It is the same type of authority as was disapproved in *Cantwell* v. *Connecticut*, 310 U. S. 296.

If such a device were sanctioned, there would be forged another ready instrument for the suppression of the faith of any unpopular minority. Repudiation of freedom would be complete (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 116, *supra*).

(2) This plan also interferes with free exercise of religion by this parent and her son. Religious freedom is available to believers and non-believers alike (*U. S.* v. *Ballard*, 322 U. S. 78). This parent is compelled by law to send her child to a public school which she must help support. She has the right to expect that such school will be entirely non-sectarian and that sectarian instruction will not there be given or permitted by school authorities, and that her child will not be subjected, directly or indirectly, to any sectarian influence, or embarrassment or inequality in respect of privileges, rights, facilities and conditions and that he will not be required to take actions inconsistent with the completely free exercise of his beliefs.

True, Appellant's son is not required to attend religion classes. That is for parental choice. But he is compelled to attend public school and to be present there during periods of religious instruction. He must conform to the school regimen. He cannot play in or out of the building. He must study, in school, required, accredited, secular work while classmates are taking the non-required religious course and playing "Biblette" games therein. This has involved his being sent away from his classroom into a music room, library, hall or other place, often by himself, when religion teachers take over his regular classroom. This is a natural cause of embarrassment to a child. Minority groups taking particular religion courses are also classified and segregated. General attention thus is called in a public place to the beliefs or lack of belief, of pupils. It emphasizes differences in race and creed. It is undemocratic.

Under Federal and State Constitutions this parent and child are entitled to exercise and enjoy their beliefs without discrimination and not to be denied or restricted in any civil right or privilege on account of religious beliefs. They are entitled to equality of treatment. The right to attend a public school free from sectarian influence is one of their civil rights.

As was said in *People ex rel. Ring* v. *Board of Education, supra,* at page 351:

> "The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain of the pupils must

be excused from it because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the constitution."

See also *Knowlton* v. *Baumhover, supra; Harfst* v. *Hoegen, supra; Herold* v. *Parish Board of School Directors, supra;* and *State ex rel. Weiss* v. *District Board, supra.* As pointed out in all of the above cases, the fact that the child is not required to attend religion classes is not material. The fact that there is any reason for his exclusion is the thing that interferes with his religious freedom.

POINT V

Certain questions are not involved here.

The situation here does not involve mere reading of a Bible version in the schools, by compulsion or permission, or a system of releasing pupils from public schools for a brief period each week for religious instruction elsewhere or the use of public school buildings outside of school hours for religious purposes. Each of those situations raises important constitutional questions which need careful consideration when presented. Because not here presented they are not briefed by us but merely mentioned. We think, however, that they are also unconstitutional on the same general grounds here discussed.

Illinois has no statute requiring or even permitting Bible reading in the schools. There, by a statute, school districts may grant temporary use of public school houses for religious meetings and Sunday Schools "when not occupied by schools". And in *People ex rel. Ring* v. *Board of Education, supra,* the Court held that the prac-

tice of having Bible selections read, the Lord's prayer recited and hymns sung in public schools constituted sectarian and religious instruction in violation of Illinois Constitution and statutes—even though attendance thereat was not compulsory and provision was made for excusing certain pupils therefrom.

The authorities on the subject of Bible reading in the schools were collected in 5 A.L.R. 866 and 141 A.L.R. 1144. The subject is exhaustively discussed in "The Legal Status of Church-State Relationships in the United States" by Johnson (Univ. Minn. Press, 1934). See also 33 Corn. Law Quar. 122 (1947).

In some States, Bible reading in public schools is required, generally without comment.[6] Some states provide that the Bible may be read in public schools without comment.[7] Some states provide that the Bible may not be excluded from public schools.[8] In several of these states (Ark., Ga., Ia., Ky., N. D., Mass.) statutory provision is made for excusing pupils from Bible reading at parents' request.

Some states have statutes which permit public school buildings to be used temporarily for religious purposes or services, as well as for other purposes, when the buildings are not in use for school purposes and outside of

6. Ark. (Sec. 3614, Pope's Ark. Stat. 1937); Ala. (Code of Ala. Title 52, Sec. 542); Del. (Sec. 2758 Rev. Code of Del. 1935); Fla. (Fla. Stat. Ann. Sec. 231.09(2)); Ga. (Code of Ga. (1933) Sec. 32-705); Idaho (Ida. Code Ann., Sec. 32-2205-7); Ky. (Rev. Stat. (1944) Ch. 158, Sec. 170); Me. (Ch. 37, Sec. 127, Rev. Stat. of Me. (1944)); Mass. (Ann. Laws of Mass. Ch. 71, Sec. 31); N. J. (Title 18:14-77, Rev. Stat. of N. J.); Pa. (Title 24, Sec. 1555, Purdons Stat. Pa.); Tenn. (Sec. 2343 Will. Tenn. Code (1934)).

7. N. D. (Sec. 15-3812, N. D. Rev. Code (1943)); Kan. (Rev. Stat. 1935, Art. 18, Ch. 72, Sec. 1819).

8. Ind. (Sec. 28-5101 Burns Ind. Stat. (1933)); Iowa (Code of Ia. (1946) Sec. 280-9); Miss. (Const., Art. III, Sec. 18); Okla. (Title 70, Sec. 495, Okla. Stat. (1941)).

school hours.[9] Many more states have statutes which permit the use of such buildings outside of school hours and when not in use for school purposes, for civil, recreational and other community purposes, but not for religious purposes.[10] No state has statutes which permit the use of school buildings during school hours for religious purposes.

The system of releasing pupils from public schools for brief periods for religious instruction outside of school buildings, calls for passing comment merely because it is adverted to by the Illinois Courts in their opinions:

Ten States (Ind., Ia., Ky., Me., Mass., Minn., N. Y., Ore., Pa., So. Dak.) have laws permitting such practice (see Appendix annexed hereto). These are recent enactments. Illinois has no such statute.

However, the Illinois Supreme Court in *People ex rel. Latimer* v. *Board of Education*, 394 Ill. 228; 68 N. E. (2) 305 (1946), upheld a Chicago program by which public school childrer were excused upon parental request for one hour weekly to attend religious education classes held at churches away from school activities and property. The court distinguished the *Ring* case, *supra*, and justified the practice on the ground that no "part of the religious instruction is held in the schoolroom or on school property" (234). It also relied on *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195. This latter case involved a plan by

9. Ind. (Sec. 28-3307 Burns Ind. Stat. 1933); Minn. (Sec. 125.06(7) Minn. Stat. Ann.); N. H. (Ch. 141, Sec. 22 Revised Laws of N. H. 1942); N. D. (Sec. 15-3514 N. D. Revised Code of 1943); Ohio (Sec. 4839-2, Pages Ohio Gen'l Code); Okla. (Tit. 70, Sec. 126, Okla. Stat. 1941); Ore. (Sec. 111-1021, Ore. Comp. Laws Ann.); Wash. (Sec. 4776, Remington's Revised Stats. of Wash.); Ill. (Sec. 123.817, Jones Ill. Stat.).

10. Ark. (Sec. 11616, Pope's Ark. Stat. 1937); Conn. (Sec. 954, Conn. Gen. Stats.); Fla. (Sec. 230.43(11), Fla. Stats. Ann.); Md. (Art. 77, Sec. 67, Ann. Code of Md.); Mass. (Ch. 71, Sec. 71, Ann. Laws of Mass.); Miss. (Sec. 6423, Miss. Code 1942); Mo. (Sec. 10337, Mo. Rev. Stats.); Neb. (Sec. 79-2138, Rev. Stats. of Neb. 1943); N. J. (Tit. 18:7-57 N. J. Rev. Stats.); N. M. (Sec. 55-1102, N. M. Stats. 1941); N. Y. (Sec. 414 Education Law); N. C. (Sec. 115-95 Gen'l Stats. of N. C. 1943); Pa. (Tit. 24, Sec. 773, Purdons Pa. Stat.); S. D. (Sec. 15.2110, S. D. Code of 1939); Tex. (Art. 2738, Vernon's Civil Stats.); Wisc. (Sec. 40.16, Wisc. Stats. 1945).

which school pupils of White Plains, N. Y. on parental request were excused once a week for the last half hour of the school session, which was a study period, so that they might attend churches or church schools for religious instruction. The New York Court pointed out that the White Plains plan did not interfere with the regular work of the school, the pupils lost no school recitation time and the plan operated outside the school building without requiring any participation in it by school teachers or authorities. The court said: "The separation of the public school system from religious denominational instruction is thus complete" (at p. 199). In another earlier New York case, *Stein* v. *Brown,* 125 Misc. 692 (1925), which has not been overruled, the court held unconstitutional a Mount Vernon, N. Y. plan for released time which was somewhat similar but involved the printing of cards used in connection therewith on school presses and time.

These cases offer a good example of how sectarianism creeps slowly step by step into the non-sectarian public school system. The *Latimer* decision was justified on the ground that the religious instruction is not held in the school buildings. The same court, in this case, goes one step further and says that the program approved in the *Latimer* case, while conducted outside of the school rooms, is to "all intents and purposes exactly the same as that involved in the instant case". By such gradual encroachments, caused by the courts' failures to adhere to basic principle and by temporizing from one situation to another, sectarianism now has been planted right in the center of public school buildings and classrooms during school hours and this, despite the fact that the existing Illinois Constitution and statutes, as well as the First Amendment, were designed to prevent that very thing.

POINT VI

This case has nation-wide importance.

Because of the application of the First Amendment to all United States citizens and because of similarities in constitutional and statutory provisions in the various States the decision in this case will have widespread significance.

In the Appendix hereto, we have collected the constitutional and statutory provisions in the 48 States that relate to the problem. Most are similar to those in Illinois.

The District of Columbia and all of the states, (except Me., N. H. and Vt.) have constitutional or statutory provisions, or both, against the use of public funds in aid or support of religious sects, institutions, instruction or sectarian purposes (see Appendix annexed hereto).

Fourteen states specifically prohibit the use of sectarian books in the public schools (Ariz., Cal., Ga., Ida., Ky., Md., Mass., Miss., Mont., Nev., N. H., N. M., N. D., Tex.—see Appendix). Nineteen states specifically prohibit sectarian instruction in the public schools (Ariz., Cal., Colo., Del., Ida., Kan., Ky., Me., Mont., Neb., Nev., N. J., N. M., Okla., S. D., Tex., Utah, Wisc., Wyo.—see Appendix).

The Constitutions of 36 states provide that no preference shall be given by law to any religious sect, denomination or mode of worship;[11] of 30 states that no one

11. Ala. (Art. I, Sec. 3); Ark. (Art. II, Sec. 24); Calif. (Art. I, Sec. 4); Colo. (Art. II, Sec. 4); Conn. (Art. VII, Sec. 1); Del. (Art. I, Sec. 1); Fla. (Decl. of Rts. Sec. 6); Idaho (Art. 1, Sec. 4); Ind. (Art. I, Sec. 4); Iowa (Art. 1, Sec. 3); Kan. (Bill of Rights, Sec. 7); Ky. (Bill of Rights, Sec. 5); La. (Art. 1, Sec. 4); Me. (Art. I, Sec. 3); Mass. (Art. of Amend. Art. XI); Minn. (Art. 1, Sec. 16); Miss. (Art. 3, Sec. 18); Mo. (Art. 2, Sec. 7); Mont. (Art. III, Sec. 4); Neb. (Art. I, Sec. 4); Nev. (Art. I, Sec. 4); N. H. (Part First, Art. 6th); N. J. (Art. I, Sec. 4); N. M. (Art. 2, Sec. 11); N. Y. (Art. 1, Sec. 3); N. D. (Art. I, Sec. 4); Ohio (Art. I, Sec. 7); Pa. (Art. 1, Sec. 3); S. C. (Art. I, Sec. 4); Tenn. (Art. I, Sec. 3); Tex. (Art. I, Sec. 6); Utah (Art. I, Sec. 4); Va. (Art. IV, Sec. 58); W. Va. (Art. 3, Sec. 15); Wisc. (Art. I, Sec. 18); Wyo. (Art. 1, Sec. 18).

shall be compelled to attend or support any place of worship or any ministry, sect, or denomination (see Appendix annexed hereto); and of 43 states that the civil rights, privileges and capacities of citizens shall not be denied or affected in any manner on account of their religious beliefs or opinions concerning religion.[12] A total of 47 states have one or more of the three above-noted variations.

In every State the organic and statutory laws were designed to carry into effect the principles inherent in the First Amendment. The state courts, in the main and until recent years, have remained faithful to their own constitutional provisions designed to protect religious freedom and to separate religions and governments. We believe this court will preserve that uniform purpose by striking down the attempt herein to evade it.

Conclusion

This case is one of first impression in this Court on the question of the introduction of religious instruction into public schools during school hours in relation to the First Amendment. It is not the first time commingling of secular and sectarian instruction in such schools has been attempted. It ought to be the last. The public school ideal of secular education and the inspired concept of separation of church from state should not be tarnished

12. Ala. (Art. I, Sec. 3); Ariz. (Art. II, Sec. 12); Ark. (Art. II, Sec. 24); Calif. (Art. I, Sec. 4); Colo. (Art. II, Sec. 4); Del. (Art. I, Sec. 2); Fla. (Decl. of Rts. Sec. 5); Ga. (Art. I, Par. XIII); Idaho (Art. 1, Sec. 4); Ill. (Art. II, Sec. 3); Ind. (Art. I, Sec. 5); Iowa (Art. 1, Sec. 4); Kan. (Bill of Rights, Sec. 7); Ky. (Bill of Rights, Sec. 5); Me. (Art. I, Sec. 3); Md. (Decl. of Rts. Arts. 36, 37); Mich. (Art. II, Sec. 3); Minn. (Art. 1, Sec. 17); Miss. (Art. 3, Sec. 18); Mo. (Art. 2, Sec. 5); Mont. (Art. III, Sec. 4); Neb. (Art. I, Sec. 4); Nev. (Art. I, Sec. 4); N. H. (Part First, Art. 5th); N. J. (Art. I, Sec. 4); N. M. (Art. 2, Sec. 11); N. Y. (Art. 1, Sec. 3); N. D. (Art. I, Sec. 4); Ohio (Art. I, Sec. 7); Okla. (Art. I, Sec. 2); Ore. (Art. I, Secs. 4, 6); Pa. (Art. I, Sec. 4); R. I. (Art. I, Sec. 3); S. D. (Art. VI, Sec. 3); Tenn. (Art. I, Sec. 4); Tex. (Art. I, Sec. 4); Utah (Art. I, Sec. 4); Vt. (Ch. I, Art. 3rd); Va. (Art. IV, Sec. 58); Wash. (Art. 1, Sec. 11); W. Va. (Art. 3, Sec. 15); Wisc. (Art. I, Sec. 19); Wyo. (Art. 1, Sec. 18).

by compromise. They invade the religious rights of no one. They assure religious freedom for all. They are uniquely American. Their great wisdom is proved again by the dire religious strifes abroad even now.

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. That is this case. The other is to obtain public funds for the aid and support of various private religious schools. Both avenues were closed by the Constitution. Neither should be opened by this Court (*Everson* case, *supra*, Rutledge, J., at p. 63).

In the *Everson* case the Court said "the First Amendment has erected a wall between church and state", "that wall must be kept high and impregnable" and the Court "could not approve the slightest breach". That high resolve, if given full effect, will protect and preserve the liberties and principles inherent in the First Amendment in the way the Founders intended.

This case is one not of a slight breach but of a flagrant breach. The action of this school board not only "approaches" the verge of constitutional power—wherever that may be—it falls over the brink. If this breach were permitted the wall would be engulfed in a floodtide of breaches.

The decision of this Court in the *Everson* case left doubts in the minds of many and has caused great controversy. Once again this Court is presented with the opportunity of restating and applying the great principles of religious freedom and separation which, for the general welfare, were placed after many years of bitter struggle in the Constitution to become the supreme law of our land and to remain so, unless and until changed by our entire people in ways provided.

We respectfully submit that the decision of the Illinois Supreme Court should be reversed, with a forthright restatement of the broad, fundamental and democratic concepts above mentioned which are an integral part of our American heritage and way of life.

Respectfully submitted,

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APPENDIX

Summary of State Constitutional and Statutory Provisions

Alabama

The Constitution provides:

> "No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school." (Art. 14, Sec. 263)
>
> • • • • •
>
> "That • • • no preference shall be given by law to any religious sect, society, denomination or mode of worship; that no one shall be compelled • • • to pay any • • • taxes • • • for maintaining any minister or ministry; • • • that the civil rights, privileges and capacities of any citizens shall not be in any manner affected by his religious principles." (Art. I, Sec. 3)

Arizona

The Constitution provides:

> "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." (Art. II, Sec. 12)
>
> • • • • •
>
> "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school • • •" (Art. IX, Sec. 10)
>
> • • • • •
>
> "No sectarian instruction shall be imparted in any school or state educational institution that may

be established under this constitution;" (Art. XI, Sec. 7)

Chap. 54-1006, Ariz. Code Ann. provides:

> "Any teacher who shall use any sectarian or denominational books, or teach any sectarian doctrine, or conduct any religious exercises in his school * * * shall be guilty of unprofessional conduct, and the proper authority shall revoke his certificate."

Arkansas

A provision in Arkansas Constitution of 1868 (Art. IX, Sec. 1) that "no religious or other sect or sects shall ever have * * * control of any part of the school funds," apparently is still in force. (See Const. of 1874, Sec. 1.)

The Constitution (Art. II, Sec. 24) provides:

> "no man can, of right, be compelled to attend * * * or support any place of worship; or to maintain any ministry against his consent."

California

The Constitution provides:

> "Neither the Legislature, nor any * * * school district, * * * shall ever * * * pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school * * * or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state * * * or other municipal corporation for any religious creed, church, or sectarian purpose, whatever * * *." (Art. IV, Sec. 30)

"No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State." (Art. IX, Sec. 8)

By Statute (Sec. 1672 Stat. and Amend. to Code of Calif.) it is provided:

"No publication of a sectarian, partisan or denominational character must be used in any school, or be made a part of any school library; nor must any sectarian or denominational doctrine be taught therein."

Colorado

The Constitution provides:

"Neither the general assembly, nor any * * * school district * * * shall ever * * * pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose or to help support or sustain any school * * * controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation, to any church, or for any sectarian purpose." (Art. IX, Sec. 7)

"No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the State, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in any religious

service whatever. No sectarian tenets or doctrines shall ever be taught in the public schools * * * ." (Art. IX, Sec. 8)

"No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent." (Art. II, Sec. 4)

Connecticut

The Constitution provides:

"The fund, called the School Fund, shall remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public, or common schools throughout the State, and for the equal benefit of all the people thereof." (Art. VIII, Sec. 2)

"No person shall by law be compelled to * * * support * * * any congregation, church or religious association." (Art. VII, Sec. 1)

Delaware

The Constitution provides:

"No portion of any fund * * * for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school;" (Art. X, Sec. 3)

* * * * *

"No man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent;" (Art. I, Sec. 1)

Rev. Code of Del. (1935), (Sec. 2758) provides:

> "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

District of Columbia

The District of Columbia Code (Title 32, Sec. 1008) provides:

> "It is hereby declared to be the policy of the Government of the United States to make no appropriation of money or property for the purpose of founding, maintaining, or aiding by payment for services, expenses, or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control; * * *"

Florida

The Constitution prohibits the diversion of school funds to any other than school purposes and further provides

> "nor shall the same, or any part thereof, be appropriated to or used for the support of any sectarian school." (Art. 12, Sec. 13)
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> * * * * *
>
> "No money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution." (Declaration of Rights, Sec. 6)

Georgia

The Constitution (Art. I, Sec. I, Par. XIV) provides:

> "No money shall ever be taken from the public Treasury, directly or indirectly, in aid of any church, sect, or denomination of religionists, or of any sectarian institution."

By statute (Code of Georgia (1933) Sec. 32-703), the Georgia Textbook Commission is given authority to adopt a uniform series of textbooks for use in all the common schools and high schools but "none of said books so adopted shall contain anything of a partisan or sectarian nature."

Idaho

The Constitution provides:

> "Neither the legislature nor any * * * school district, * * *, shall ever * * * pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, or to help support or sustain any school * * * controlled by any church, sectarian or religious denomination whatsoever; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation to any church or for any sectarian or religious purpose." (Art. 9, Sec. 5)

> "No sectarian or religious tenets or doctrines shall ever be taught in the public schools, * * * No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article, nor shall any teacher

or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article." (Art. 9, Sec. 6)

The statutes contain a similar provision. (See Idaho Code Ann. (1932), Sec. 32-2204.)

The Constitution provides, also:

"No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; * * *." (Art. I, Sec. 4)

Illinois

The Constitution provides:

"No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship." (Art. II, Sec. 3)

"Neither the General Assembly nor any * * * school district, * * *, shall ever * * * pay from any public fund whatever, anything in aid of any church or sectarian purpose or to help support or sustain any school * * * controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State or any such public corporation to any church, or for any sectarian purpose." (Art. VIII, Sec. 3)

The statutes contain a similar provision (Ill. Rev. Stat. Chap. 122, Sec. 286).

By Statutes the board of school directors and the board of education "have the control and supervision of all

public schoolhouses in their district, and to grant the temporary use of them, when not occupied by schools, for religious meetings and Sunday schools * * *" (Ill. Rev. Stat. (1943) Ch. 122, Sec. 123, Ill. Rev. Stat. (1939) Ch. 122, Sec. 136).

Indiana

The Constitution provides:

> "No money shall be drawn from the treasury, for the benefit of any religious or theological institution" (Art. 1, Sec. 6).
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> * * * * *
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> "* * * no man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent." (Art. 1, Sec. 4)

Also under the Constitution (Art. 8, Sec. 3), the school fund must be used in the support of common schools and to no other purpose.

A statute provides (Ch. 225, Laws of 1943):

> "That if it is the wish of the parent * * * that such child attend, for a period or periods to be determined by the local principal or superintendent of schools and not exceeding in the aggregate one hundred and twenty minutes in any week, a school for religious instruction, conducted and maintained by some church or association or churches, or by some association organized for religious instruction, and incorporated under the laws of this state, and which school shall not be conducted or maintained, either in whole or in part, by the use of public funds raised by taxation; such child upon written request of the parent, * * * may be permitted to attend such school for religious

instruction and such permission shall be valid for not longer than the school year during which it is issued. * * *"

Iowa

The Constitution (Art. 1, Sec. 3) provides:

"* * * nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."

Another statute (Section 299.1(4) Code of Iowa 1946) provides that the public school attendance requirements shall not apply to any child "while attending religious services or receiving religious instruction".

By Statute (Secs. 343.8 and 363.22 Code of Iowa (1946)) public money may not be appropriated, given, or loaned by any political subdivision "to or in favor of any institution, school, association, or object which is under ecclesiastical or sectarian management or control".

Kansas

The Constitution reads:

"No religious sect or sects shall ever control any part of the common-school or university funds of this state." (Art. 6, Sec. 8)

* * * * * *

"* * * nor shall any person be compelled to attend or support any form of worship; * * *" (Bill of Rights, Sec. 7).

The Statutes provide (Rev. Stat. of Kan. 1935, Ch. 72, Sec. 1819):

"No sectarian doctrine shall be taught or inculcated in any of the public schools of the city * * *".

Kentucky

The Constitution of Kentucky reads:

> "• • • nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed." (Bill of Rights, Sec. 5)
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> • • • • •
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> "No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used, by or in aid of any church, sectarian or denominational school." (Sec. 189)

By Statute it is provided (Rev. Stat. 1944, Chap. 158, Sec. 190):

> "No book or other publication of a sectarian, infidel or immoral character, or that reflects on any religious denomination, shall be used or distributed in any common school. No sectarian, infidel or immoral doctrine shall be taught in any common school."

Provision is made in the statutes for the "moral instruction" of public school pupils who desire it and have the consent of their parents without expense to any board of education (see Rev. Stat. 1944, Chap. 158, Secs. 200, 210, 220, 230, 240, 250, 260). Section 220 provides:

> "The boards of education shall fix one day each week when pupils who have expressed a desire for moral instruction may be excused for at least one hour to attend their respective places of worship

or some other suitable place to receive moral instruction in accordance with the religious faith or preference of the pupils."

Louisiana

The Constitution reads:

> "No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such, and no preference shall ever be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship." (Art. 4, Sec. 8)
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> * * * * *
>
> "No public funds shall be used for the support of any private or sectarian school." (Art. 12, Sec. 13)

Section 2241 of Louisiana General Statutes, Dart, reads:

> "The school boards of the several parishes of this state are prohibited from entering into any contract * * * understanding * * *, tacitly or expressly, directly or indirectly, with any church, * * * or association of any religious sect or denomination whatsoever, with the representatives thereof * * * for the purpose of running any public school or schools of this state together, in connection, or in combination with any private or parochial school, or other institution of learning which may be under the control or management of any church * * * or other religious * * * association of any religious sect or denomination whatsoever * * *."

Maine

Revised Statutes of Maine (1944) (Ch. 37, Sec. 127) provides for Bible reading and:

> "It is provided further, that there shall be no denominational or sectarian comment or teaching, and each student shall give respectful attention but shall be free in his own forms of worship."

The Statutes also provide (Rev. St. of Maine, Ch. 37, Sec. 129):

> "The school committee of each city or town may authorize and complete a survey of the religious affiliation of all pupils attending the public schools within such city or town, and ascertain those pupils who desire and have the consent of parent or guardian for moral instruction. On a day in each week, to be fixed by the board, it may excuse such pupils for at least 1 hour for the purpose of attending their respective places of worship, or some other suitable place, there to receive moral instruction in accordance with the religious faith of said pupils."

Chapter 37, Sections 130-34 contain more detailed provision for such "moral instruction" which is said to be "permissive" and which shall be without expense to the school authorities.

Maryland

The Constitution provides (Art. 36, Declaration of Rights) "nor ought any person to be compelled • • • to maintain any place of worship or any ministry."

The Constitution further provides (Art. 8) that the General Assembly shall provide by taxation for the maintenance of free public schools.

A Maryland statute (Art. 77, Sec. 126, Ann. Code of Maryland, 1939) provides that "school books shall contain nothing of a sectarian or partisan character."

Massachusetts

The Constitution provides in part (Art. of Amend. Art. XVIII, Sec. 2):

> "* * * no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated * * *."

Statutes provide:

> "Absences [from school] may also be permitted for religious education at such times as the school committee may establish; provided, that no public funds shall be appropriated or expended for such education or for transportation incidental thereto; and provided, further, that such time shall be no more than one hour each week." (Ann. Laws of Mass., Ch. 76, Sec. 1)
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> * * * * * *
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> "The school committee shall not purchase or use in the public schools school books favoring the tenets of any particular religious sect." (Ch. 71, Sec. 31)

Michigan

The Constitution (Art. II, Sec. 3) provides:

> "No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes,

taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose."

The statutes (Sec. 15.392 Mich. Stat. Ann.) provide:

"No school district shall apply any of the moneys received by it from the primary school interest fund or from any and all other sources for the support and maintenance of any school of a sectarian character, whether the same be under the control of any religious society or made sectarian by the school district board."

Section 15.1927 (Mich. Stat. Ann.) provides:

"Nothing in this act contained shall be construed so as to permit any parochial, denominational, or private school to participate in the distribution of the primary school fund."

Minnesota

The Constitution of Minnesota states:

"* * * nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry against his consent, * * * nor shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries." (Art. 1, Sec. 16)

* * * * *

"* * * But in no case shall the moneys derived as aforesaid, (taxation) or any portion thereof, or any public moneys or property, be appropriated or used for the support of schools wherein the dis-

tinctive doctrines, creeds or tenets of any particular Christian or other religious sect, are promulgated or taught." (Art. 8, Sec. 3)

Section 131.14 of Minn. Statutes, Ann. states:

"The teachers in all public schools shall give instruction in morals * * *."

The Compulsory Education statute provides (Sec. 132.05(3) Minn. Stat. Ann.):

"Such child may be excused from attendance * * * upon its being shown to the satisfaction of such (school) board:

(3) That it is the wish of the parent, guardian * * * that he attend for a period or periods not exceeding in the aggregate three hours in any week, a school for religious instruction * * * such school to be conducted and maintained in a place other than a public school building, and in no event, in whole or in part, at public expense; provided that a child may be absent from school on such days as the child attends upon instruction according to the ordinance of some church;"

Mississippi

The Constitution (Art. 8, Sec. 208) provides:

"No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school."

By Section 6423(4), Miss. Code 1942, School district trustees are under a duty "to exclude from the schools and

school libraries all books or papers of a sectarian, partisan, denominational or immoral character."

Another statute (Sec. 6672 Miss. Code Ann. 1942) provides:

> "A suitable course of instruction in the principles of morality and good manners, prepared by the state board of education shall be used in all the public schools of the state. Such course shall include what is known as the Mosaic Ten Commandments and may be graded with the idea that a certain amount of time will be devoted to it in each grade. No doctrinal or sectarian teaching shall be permitted in any public school or in the state and no pupil shall be required to take the course provided for herein when the parent or guardian of such pupil shall so request in writing filed with the superintendent or teacher. * * *"

Missouri

The Constitution provides:

> "That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion; * * *" (Art. 1, Sec. 6)
>
> * * * * * *
>
> "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such * * *". (Art. 1, Sec. 7)
>
> * * * * * *
>
> "Neither the general assembly, nor any * * *, school district * * *, shall ever * * * pay from any public fund whatever, anything in aid of any

religious creed, church or sectarian purpose; or to help to support or sustain any private or public school, * * * or other institution of learning, controlled by any religious creed, church or sectarian denomination whatever, nor shall any grant or donation of personal property or real estate ever be made by the state, or * * * other municipal corporation, for any religious creed, church or sectarian purpose whatever." (Art. 9, Sec. 8)

Montana

The State Constitution provides:

"No person shall be required to attend any place of worship or support any ministry, religious sect, or denomination, against his consent; * * *". (Art. III, Sec. 4)

* * * * *

"Neither the legislative assembly, nor * * * school district, * * *, shall ever make directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose, or to aid in the support of any school * * * controlled in whole or in part by any church, sect or denomination whatever." (Art. XI, Sec. 8)

* * * * *

"* * * nor shall any sectarian tenets be taught in any public educational institution of the state; * * *" (Art. XI, Sec. 9)

"No appropriation shall be made for * * * educational * * * purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association." (Art. V, Sec. 35)

By statute (Sec. 1055, Rev. Code of Mont. 1935):

> "No publication of a sectarian, partisan, or denominational character shall be used or distributed in any school or be made a part of any school library; nor shall any sectarian or denominational doctrines be taught therein."

Nebraska

The Constitution provides:

> "No person shall be compelled to attend, erect or support any place of worship against his consent." (Art. I, Sec. 4)
>
> * * * * *
>
> "No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes * * *. Neither the state Legislature nor any * * * other public corporation, shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof. * * *" (Art. VII, Sec. 11)

Nevada

The Constitution provides:

> "* * * any school district * * * which shall allow instruction of a sectarian character therein, may be deprived of its proportion of the interest of the public school fund during such * * * infraction;" (Art. XI, Sec. 2)
>
> * * * * *

"No sectarian instruction shall be imparted or tolerated in any school or university that may be established under the constitution." (Art. XI, Sec. 9)

* * * * *

"No public funds of any kind or character whatever, state, county, or municipal, shall be used for sectarian purposes". (Art. XI, Sec. 10)

The Statutes provide:

"No books, tracts, or papers of a sectarian or denominational character shall be used or introduced in any schools established under the provisions of this act; nor shall any sectarian or denominational doctrines be taught therein; nor shall any school whatever receive any of the public school funds which has not been taught in accordance with the provisions of this section." (Section 5754, Nev. Comp. Laws 1929)

* * * * *

"No portion of the public school funds, nor of the moneys raised by the state tax, or specially appropriated for the support of public schools, shall be devoted to any other object or purpose; nor shall any portion of the public school funds nor of money raised by state tax for the support of public schools, be in any way segregated, divided or set apart for the use or benefit of any sectarian or secular society or association." (Sec. 5786 Nev. Comp. Laws 1929)

New Hampshire

The Constitution provides (Part First Arts. 5th and 6th):

"* * * no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for

worshiping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion: * * *;" (5th)

* * * * * *

"And no person, of any one particular religious sect, denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect, or denomination." (6th)

By Statute (Rev. Laws of N. H. (1942) Ch. 135, Sec. 26):

"No book shall be introduced into the public schools calculated to favor any particular religious sect or political party."

New Jersey

The Constitution provides (Art. I, Sec. 3):

"* * * nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform."

The Revised Statutes (Sec. 18: 14-78) state:

"No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

Section 18:22-9 of the Revised Statutes provide:

"No disbursement of the money raised by the state for the purpose of public higher education

shall be made to any institution wholly or in part under the control of a religious denomination or in which a denominational tenet or doctrine is taught."

New Mexico

The New Mexico Statute (1941) (Sec. 55-1102) provides:

"No teacher shall use any sectarian or denominational books in the schools or teach sectarian doctrine in the schools."

The Constitution states:

"* * * no part of the * * * funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university." (Art. 12, Sec. 3)

* * * * *

"No person shall be required to attend any place of worship or support any religious sect or denomination; * * *." (Art. 2, Sec. 11)

New York

The Constitution (Art. 11, Sec. 4) provides:

"Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance * * * of any school or institution of learning wholly or in part under the control or direction of any religious denomination or in which any denominational tenet or doctrine is taught * * *."

Section 3210 (1b) N. Y. Education Law provides:

"Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

North Carolina

The Constitution (Art. IX, Sec. 4) provides for the establishment of a school fund and provides that it shall be used for maintaining "a system of free public schools, and for no other uses or purposes whatsoever."

North Dakota

The Constitution (Art. VIII) states:

> "* * * the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control * * *." (Sec. 147)
>
> "* * * No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school." (Sec. 152)

By Statutes it is provided:

> "No sectarian publication devoted to the discussion of sectarian differences and creeds shall be admitted to the (School) library." (Sec. 15-2507, N. D. Rev. Code 1943)
>
> "Parents, guardians * * * of a child of compulsory school age may have such child excused from school attendance for the purpose of sending him to any parochial school to prepare such child for religious duties, for a total period of not exceeding six months in the aggregate and such period may extend over one or more years. No transportation shall be furnished * * * for any child who is attending a parochial school under the provisions of this chapter * * *." (Sec. 15-3407, N. D. Rev. Code 1943)

"The school board or board of education of every school district, * * * supported by appropriations or by tax levies, shall cause a placard containing the ten commandments of the Christian religion to be displayed in a conspicuous place in every schoolroom, classroom, or other place where classes convene for instruction * * *." (Sec. 15-4710, N. D. Rev. Code 1943)

Ohio

The Constitution provides:

"No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent." (Art. I, Sec. 7)

"* * * no religious or other sect or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this State." (Art. VI, Sec. 2)

Oklahoma

The State Constitution provides:

"Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and free from sectarian control; * * *." (Art. I, Sec. 5)

"No public money or property shall ever be appropriated, applied, donated or used, directly or indirectly, for the use, benefit or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister or other religious teacher

or dignitary or sectarian institution as such." (Art. II, Sec. 5)

"* * * no part of the proceeds arising from the sale or disposal of any lands granted for educational purposes, or the income or rentals thereof, shall be used for the support of any religious or sectarian school, college or university * * *" (Art. XI, Sec. 5)

By statute, it is provided (Title 70, Sec. 495, Okla. Stat. 1941):

"No sectarian or religious doctrine shall be taught or inculcated in any of the public schools of this state."

Oregon

The Constitution (Art. I, Sec. 5) provides:

"No money shall be drawn from the treasury for the benefit of any religious or theological institution, * * *."

By statute (Sec. 111-2106 Ore. Comp. Laws Ann.) it is unlawful for teachers in public schools to wear in school the dress or garb of any religious order, sect or denomination.

Another statute (Sec. 111-3014 Ore. Comp. Laws Ann.) provides:

"Any child attending the public school, on application of his guardian or either of his parents, may be excused from such school for a period or periods not exceeding one hundred and twenty (120) minutes in any week to attend weekday schools giving instruction in religion."

Pennsylvania

The Constitution provides:

> "no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent;" (Art. I, Sec. 3)
>
> • • • • • •
>
> "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school." (Art. X, Sec. 2)

The Statutes provide (Title 24, Sec. 1563, Purdon's Pa. Stat.):

> "Any board of school directors of any school district shall have power to enter into suitable arrangement with a religious group, or organization of responsible citizens resident in the school district, who are interested in organizing part-time weekday religious education for school pupils. In such cases the board of school directors shall have power to adopt such rules and regulations for the release from school sessions of those pupils whose parents, or surviving parent, or guardian • • • desires to have them attend a class to receive religious education, in accordance with their religious faith for not more than one hour a week, subject, however, to such conditions and the keeping of such records of attendance at such classes and other records for the inspection of school authorities as the board shall deem proper. No part of the cost and expense of such religious instruction shall be paid out of public school funds."

Rhode Island

The Constitution (Art. I, Sec. 3) provides:

> "• • • whereas a principal object of our venerable ancestors, in their migration to this country and

> their settlement of this State, was, as they expressed it, to hold forth a lively experiment, that a flourishing civil state may stand and be best maintained with full liberty in religious concernments: We, therefore, declare that no man shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of his own voluntary contract; nor enforced, restrained, molested, or burdened in his body or goods; nor disqualified from holding any office; nor otherwise suffer on account of his religious belief * * *".

The Constitution also speaks (Art. XII, Secs. 2, 4) of the establishment of a permanent fund for the support of public schools and provides that the fund shall not be used for any other purpose.

The Statutes (R. I. Gen. Laws (1938), Chap. 180, Sec. 8), provide:

> "Every teacher shall aim to implant and cultivate in the minds of all children committed to his care the principles of morality and virtue."

South Carolina

The Constitution (Art. XI, Sec. 9) provides:

> "The property or credit of the State of South Carolina, or of any * * * school district, or other subdivision of the said State, or any public money, from whatever source derived, shall not * * * be used, directly or indirectly, in aid or maintenance of any college, school * * * or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization."

South Dakota

The Constitution (Art. VI, Sec. 3) provides:

> "No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution."

The Statutes provide (Sec. 15.3103 So. Dak., Code of 1939):

> "No sectarian doctrine may be taught or inculcated in any of the public schools of the state."

(Sec. 15.3202 (6) So. Dak., Code of 1939):

> "A child may, on application of his parent or guardian, be excused from school for one hour per week for the purpose of taking and receiving religious instruction conducted by some church or association of churches or any Sunday school association * * *. The county superintendent of schools in common school districts and the board of education in consolidated and independent school districts shall decide at what hour pupils may be thus excused, and in no event shall such instruction be given in whole or in part at public expense."

Tennessee

The Constitution (Art I, Sec. 3) provides:

> "that no man can of right, be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent;"

The Constitution (Art. XI, Sec. 12) further provides that the school fund is not to be "diverted to any other

use than the support and encouragement of common schools."

A statute provides (Sec. 2344, Will. Tenn. Code, 1934):

> "It shall be unlawful for any teacher in any of the * * * public schools of the state which are supported, in whole or in part, by the public school funds of the state, to teach any theory that denies the story of the divine creation of man as taught in the Bible, and to teach instead that man descended from a lower order of animals."

Texas

The Constitution provides:

> "No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent." (Art. I, Sec. 6)
>
> * * * * *
>
> "No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes." (Art. I, Sec. 7)
>
> * * * * *
>
> "* * * nor shall the same (school fund), or any part thereof ever be appropriated to or used for the support of any sectarian school * * *." (Art. VII, Sec. 5)

A statute (Art. 2899, Ver. Civ. Stat. of Texas) provides:

> "No part of the public school fund shall be appropriated to or used for the support of any sectarian school."

A statute (Art. 2843, Ver. Civ. Stat. of Texas) provides for the adoption of a uniform system of textbooks and states: "* * * provided that none of said books shall contain anything of a partisan or sectarian character * * *." It also provided (Art. 2604) that "No course of instruction of a sectarian character shall be taught" in the State University.

Utah

The Constitution provides:

> "The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; * * * There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment." (Art. I, Sec. 4)
>
> * * * * * *
>
> "The Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control." (Art. III, Sec. Fourth)

(See also Art. X, Sec. 1 to same effect.)

> "Neither the Legislature nor any * * * school district * * *, shall make any appropriation to and in the support of any school, * * * controlled in whole, or in part, by any church, sect or denomination whatever." (Art. X, Sec. 13)

Section 75-1-4 of the Utah Code (1943) provides:

> "It shall be unlawful * * * to teach in the public schools of this state while in session any

* * * atheistic, infidel, sectarian-religious or denominational doctrine. * * * In prescribing the studies and exercises and in the management and control of such institutions no partiality or preference shall be shown to one sect or religious denomination over another. * * *"

Vermont

Article 3 of the Constitution provides:

"* * * that no man ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience, nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, * * *."

Virginia

Section 58 of the Constitution provides:

"No man shall be compelled to frequent or support any religious worship, place or ministry, whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in no wise diminish, enlarge, or affect, their civil capacities. And the general assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this State, to levy on themselves, or others any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; * * *."

Washington

The Constitution (Art. 1, Sec. 11, Amend. 4) provides:

> "RELIGIOUS FREEDOM.—Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or be disturbed, in person or property on account of religion; * * *. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or support of any religious establishment."

West Virginia

The Constitution (Art. 3, Sec. 15) provides:

> "No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever; nor shall any man be enforced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief, * * * and the Legislature shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this State, to levy on themselves, or others, any tax for the erection or repair of any house for public worship, or for the support of any church or ministry * * *."

Wisconsin

The Constitution provides:

> "* * * nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; * * * nor

shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries." (Art. I, Sec. 18)

* * * * *

"The legislature shall provide by law for the establishment of district schools * * * and no sectarian instruction shall be allowed therein." (Art. X, Sec. 2)

Wyoming

The Constitution provides:

"No sectarian instruction, qualification or tests shall be imparted, exacted, applied or in any manner tolerated in the schools of any grade or character controlled by the state, nor shall attendance be required at any religious service therein, nor shall any sectarian tenets or doctrines be taught or favored in any public school or institution that may be established under this constitution." (Art. 7, Sec. 12)

* * * * *

"No money of the state shall ever be given or appropriated to any sectarian or religious society or institution." (Art. 1, Sec. 19)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 90

PEOPLE OF THE STATE OF ILLINOIS ex rel.,
VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, and ELMER C. BASH and ALICE J. BASH, and WANDA I. BASH, a minor, by ELMER C. BASH, her father and next friend,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF ATTORNEY GENERAL OF ILLINOIS AS AMICUS CURIAE.

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ARGUMENT

I.

The Record Does Not Disclose Any Violation of the Constitution of the United States.

The Constitution of Illinois, as expounded by her Supreme Court, inhibits the *compulsory* hearing or reading on the part of school children of any version of the

Bible; and this is true even though such reading, by the pupil or by his teacher, is unaccompanied by any interpretation of or other commentary on the text. *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334. In short, Illinois forbids the compulsory presentation of the Bible in the public schools, even as a literary document only.

But appellant would read the Fourteenth Amendment as categorically prohibiting the instant Board of Education from even permitting the purely *optional* study of the Bible by any child upon publicly-owned school property during school hours.

Illinois' Attorney General asks this Court to consider the implications of appellant's proposition the more carefully because it embodies an interpretation of the Fourteenth Amendment that has never before, so far as we are aware, found utterance upon the part of any litigant in this Court in the history of the Union and because it is opposed to scholastic traditions throughout the nation that are older than the federal or any state constitution.

The Bible is all but universally recognized as of prodigious literary and historical importance in the world's culture. It has informed and inspired the art and letters of the world's civilizations for thousands of years.

But if appellant's constitutional thesis is correct, although children may be compelled to study the history of the Western World, a history that has been dominated in many of its aspects by the writings in question, nevertheless they may not be even *permitted*, much less compelled, to read those writings themselves on school property. And this is true, according to appellant, notwithstanding the fact that the parents (whose responsibility for their children's tutelage must remain primary among a free people) desire that their children be tutored in this great literary work.

A pupil may be compelled to read *Paradise Lost*, *Pilgrim's Progress* and the *Ode on a Grecian Urn*. Since the *Ode on a Grecian Urn* refers to Greek and not to Christian or Judaic religious themes, he may be compelled to learn the classical theology of Greece and Rome. But he may not be even allowed, much less required, to read as a part of his school work any part of the writings that form the basis of allusion in *Paradise Lost*, *Pilgrim's Progress*, much of the poetry of Shakespeare or almost any of the countless other literary works that comprise the elements of a liberal education.

A child may be compelled to take a course in the artistic masterpieces and may be required to study Leonardo da Vinci's "*The Last Supper.*" But appellant says that he must not within the precincts of the public school hear the story that da Vinci has set upon canvas.

This most extraordinary conception of constitutional law (and of the elements of a liberal education) is proposed in the name of "tolerance," "liberty of the mind," and "freedom of education."

The very fact that in many states the Bible is regularly taught as a part of public school curriculum embodies a practical and actual construction of the Fourteenth Amendment by the states themselves; and since it is the states that ratified this amendment and to whom its prohibitions are directed, a wide consensus on the part of the state authorities tolerating a reading of the Bible should, we submit, receive a very respectful (although of course not controlling) consideration upon the part of this Court. *Had the State Legislatures been told that their ratification of the Fourteenth Amendment would proscribe the voluntary reading of the Bible on school property, it is very doubtful that that amendment would have been adopted at all.*

If appellant's constitutional doctrine is correct, a state university may not give a course in Biblical letters or even a course in comparative religion if the Bible is one of the texts.

Illinois' Attorney General briefly but strongly emphasizes the historical demonstration developed in appellees' brief (pp. 94-100) that Thomas Jefferson himself was the author of a plan for voluntary religious education upon the publicly-owned grounds of the University of Virginia; and that this plan found approbation in the times and among the people who wrote and ratified the First Amendment.

The important question as to whether the Bible may comprise a part of the elective curriculum of the public schools should, we submit, be left to the states, whose governments are, with this Court, custodians of constitutional liberty and guardians of civil rights.

The Illinois Supreme Court's holding that appellant cannot *as a taxpayer* prevent in this suit the infinitesimal expenditure of taxes theoretically involved is, we submit, conclusive here so far as appellant seeks to ground her suit upon a right to prevent the disbursement of public funds; for the court's holding goes to the remedy and procedure only, namely, a "taxpayer's suit."

II.

Appellant, Having Sought Nothing Less Than the Total Prohibition of the Teaching of the Bible in the Public Schools of Illinois, Is Not Entitled to Have This Court Consider Any Less Complete Abridgment or Modification of the Champaign Plan Than Such Total Prohibition.

The prayer of appellant's petition, *totidem verbis*, is as follows:

> "Wherefore, petitioner prays this Honorable Court to issue a writ of mandamus to the Board of Education of School District Number 71, Champaign County, Illinois, ordering it to immediately adopt and enforce rules and regulations prohibiting *all* instruction in and teaching of religious education in all public schools in Champaign School District Number 71, Champaign County, Illinois, and in all public school houses and buildings in said district when occupied by public schools." (Tr. 17.) (Emphasis supplied.)

Appellant thus sought the total extirpation of the Bible from public school premises except, perhaps, as a book on the shelves of a school library. (But it is not at all clear that even the mere presence of the Bible in a school library where it would be accessible to children would not violate appellant's extraordinary notions of "Freedom of Conscience.")

She sought no writ to be framed in terms less drastic than total suppression of the Bible as reading matter in the school curriculum. She did not ask, for instance, a writ which would prohibit merely the alleged "censorship" of *personnel* or content of instruction under sectarian auspices. She prayed no modification of the plan that would relieve it of any of the specific and particular features, other than teaching the Bible, of which she complains.

The only question that she raised and presented is the following:

> May the voluntary instruction in the Bible under any auspices, and under any plan, so long as the reading occurs "in the public school building," be totally and absolutely interdicted?

Once it is perceived that appellant demanded the total closing of the Bible in the public schools, seeking and therefore being entitled to nothing less, it will, we submit, be apparent that the particular details of the Champaign plan are not in question here in any focus more specifically circumscribed than that intended by a general attack upon the reading of the Bible in the public school under any circumstances.

Conclusion.

For the reasons urged in appellees' brief and in the instant brief, the Attorney General of Illinois submits that the judgment appealed from should be affirmed if this cause is not dismissed for want of jurisdiction upon reconsideration of appellees' motion to that end.

Respectfully submitted,

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WILLIAM C. WINES,
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Of Counsel.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 90

PEOPLE OF THE STATE OF ILLINOIS, EX REL.,
VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE ON BEHALF OF GENERAL CONFERENCE OF SEVENTH DAY ADVENTISTS

HOMER CUMMINGS,
WILLIAM D. DONNELLY,
Counsel

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 90

PEOPLE OF THE STATE OF ILLINOIS, EX REL., VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The General Conference of Seventh Day Adventists, representing more than 200,000 members of the Denomination in the United States, prays leave to present this brief *amicus curiae* because of its deep concern with the vital

issue of separation of church and state. The Denomination operates more than 900 day schools, mostly of elementary grades, and would benefit from a program of public aid. It is our position, however, that the prohibition of the First Amendment, through the Fourteenth, forbids state support, financial or otherwise, of religion, in any guise, form or degree and that "religion" as used in the amendment includes religious training and teaching in whatever form.

Pursuant to Rule 27, par. 9, we have sought, but have been unable to obtain, the consent of counsel for both parties to the filing of this brief.

The General Conference of Seventh Day Adventists therefore respectfully moves this Court for leave to file the accompanying brief as *amicus curiae*.

HOMER CUMMINGS,
WILLIAM D. DONNELLY,
Counsel for General Conference of Seventh Day Adventists.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 90

PEOPLE OF THE STATE OF ILLINOIS, EX REL., VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, ET AL.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

The President's Committee on Civil Rights, in its report "To Secure These Rights," refers to the right of conscience as "an expression of confidence in the ability of free men to learn the truth through the *unhampered* interplay of *competing* ideas." (Emphasis supplied.) Explaining its failure to make any extensive study of the national record as to freedom of religion, the Committee states (p. 47):

> "what finally determined us was the conviction that this right is relatively secure"

We do not agree. The decision of the court below, if allowed to stand, and particularly if held consonant with

the principles enunciated in *Everson* v. *Board of Education*, 330 U. S. 1, constitutes a direct peril to the separation of church and state and the protection to small religious minorities guaranteed by the First Amendment; a threat so grave as to require this Denomination to voice its protest. The importance of the question outweighs the natural reluctance of the Denomination to file a brief as *amicus curiae*, by which we may give even superficial basis for an erroneous conclusion that we adopt or approve the extreme anti-religionism which has been introduced into the record in this case.

Jurisdiction

The complaint, so far as the Federal Constitution is concerned, alleges that in violation of the First and Fourteenth Amendments instructors in religious education invade the public schools, "usurp and take over the use of said property for religious education," oust the teaching of secular education provided and required by law, and in the place thereof, substitute instruction in religious education in certain grades, including the 4th, 5th and 6th for a thirty-minute period each week. This practice has been maintained for approximately five years (R. 4-5); that the instructor of the children in the class of the child of appellant is employed and compensated by, and under the control and supervision of, the Council (R. 7-8); that by reason of this practice an establishment of religion is engrafted on public school education. Public education is controlled and censored privately by sectarians with resulting denial of equal protection and contrary to the First and Fourteenth Amendments (R. 8); that by reason of the segregation of children of parents who do not consent to their religous education, and accompanying ostracism, hostility and embarrassment, compulsion and coercion are exerted upon the child of plaintiff to participate, and upon the

plaintiff to permit participation, in violation of their constitutional rights to be "free from religion and worship" and from the exercise of either as provided by the First and Fourteenth Amendments (R. 10). The complaint also sets forth the Illinois statutes conferring on the Board of Education control and supervision of public schools (R. 11) and power to appoint all teachers for them (R. 13); and it alleges that the defendant school board provides education as to certain religious beliefs but fails to provide education according to the beliefs of children of certain religious faiths or according to the beliefs of children of atheists in violation of the equal protection clause of the Federal Constitution (R. 14).

The answer supplements the complaint and makes clear the issues as understood by the parties. *Cole* v. *Ralph*, 252 U. S. 286, 290. In Par. 12 (R. 41) it admits the allegation (R. 5) that religious instructors do enter the classrooms of the 4th, 5th and 6th grades and that said practice has been maintained for a period of approximately five years but denies that such practice constitutes an invasion of the schools (R. 41); alleges that the religious education classes "have been solely under the control and jurisdiction of the Champaign Council of Religious Education" and admits that during the period in question the defendant has made available to the Council of Religious Education and each and every faith represented thereby the use of certain rooms in the school buildings (R. 42). Particularly addressing attention to paragraph 24 of the complaint, the answer denies that "Its [the Board's] acts in permitting the said religious education classes to be conducted in the public school buildings of the defendant are contrary either to the First or Fourteenth Amendments to the Constitution of the United States * * *" (R. 45). The answer thus interprets and makes clear defendant's understanding of the complaint with respect to the use of public school-

rooms as alleging that defendant permits such use and as alleging that its acts in so permitting such use violate the religious liberty clause of the First Amendment made part of the Fourteenth Amendment, and the equal protection clause of the latter.

The Trial Court recognized appellant's contention to be "that school laws become laws for *establishment of religion* where religious education in the public schools and the public school houses aids, creates and increases interest in the religion and patronage of churches whose religion is being taught" and that the "Champaign system" violates the First and Fourteenth Amendments to the Constitution of the United States (R. 71).

The Supreme Court of Illinois stated (R. 270):

> "The errors relied upon by the relator for reversal are: (1) The segregation of public-school pupils into sectarian groups for the purpose of instruction in a public school is violative of Federal and State constitutional guaranties of freedom of religion—the fourteenth amendment to the Federal constitution * * * (4) The discretion of an administrative body and officer in this case is * * * a violation of the guaranties of due process of law and equal protection of laws by the fourteenth amendment to the constitution of the United States."

And it added (p. 271):

> "It is particularly urged that the plan of the school district of providing religious instruction for three groups—Catholic, Jewish and Protestant through distribution of cards or schedules for voluntary registration, with provision of public schoolroom and of school-time periods for such instruction is obnoxious to the constitutional guaranties."

The context of the last clearly indicates that the reference is to the freedom of religion guaranteed by the fourteenth

amendment as well as to the state constitutional provisions.

The court summarized the record (R. 279) as presenting the simple question:

> does either the Federal or State constitution, or both, in their guaranty of religious freedom, prohibit voluntary religious classes in the public schools under the plan as disclosed by this record?

Furthermore, the evidence includes testimony of the President of the School Board that "according to the minutes of the school board they were granted permission [for religious education in the schools] on June 6, 1940." (R. 127).

Stripped of artificialities the record is clear that the parties and the Courts understood the complaint as drawing in question the validity of the resolution of the School Board granting permission for religious education under which the Champaign plan was instituted on the ground of its being repugnant to the 1st and 14th Amendments to the Constitution of the United States. The administrative action of the school board must be regarded as state action. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 343; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624.

Jurisdiction of this Court under Section 237(a), Judicial Code, is therefore clear. *Hamilton* v. *Regents*, 293 U. S. 245; *John P. King* v. *Augusta Manufacturing Co.*, 275 U. S. 312; *Jamison* v. *Texas*, 318 U. S. 413.

Question Presented

Whether a resolution of a municipal board of education is repugnant to the religious liberty clause of the First Amendment included in the Fourteenth Amendment where it authorizes the use of public school rooms for thirty to fifty minutes once a week during regular school time for

sectarian religious instruction of children of parents indicating permission that they be so instructed where such permission is obtained on cards prepared and distributed through the office of the superintendent of schools and where, pursuant to the authority granted by the school board, an independent Council of Religious Education to which all sects are welcome through committees, including representatives of the Protestant, Catholic and Jewish groups, censors all lesson material and curricula so as to eliminate offensive, doctrinal, dogmatic or sectarian teaching and, subject to the approval of the school superintendent, appoints the instructors who are paid by the several church organizations, and through such instructors, pursuant to direction of the school superintendent, arranges with school principals and teachers for time and rooms.

Statement of Facts

This is a petition for a writ of mandamus brought in the Circuit Court of Champaign County, Illinois, by Vashti McCollum, as resident and real property taxpayer in Champaign School District No. 71 and as mother of James Terry McCollum, a ten-year old boy attending the Dr. Howard Public School in that School District. The prayer was for an order directing the Board to prohibit all instructions in and teaching of religious education in all public schools in that district (R. 1, 17).

The Champaign Council of Religious Education has three elements: Protestants, Catholic and Jewish groups (R. 106, 157). On the Council's curriculum and finance committees are representatives of the three groups (R. 157). Each of the three groups also has work, curriculum, finance and personnel committees of its own (R. 157). The curriculum committee of the Protestant group does not select or help in the selection of material for Catholic classes (R. 226).

It is the policy of the Council that no denominational belief shall be taught (R. 107, 159, 161, 162).

The Protestant committee selects general religious matter accepted by the over 200 Christian churches that agree on fundamentals (R. 226) but it was all Protestant material (R. 227). This curriculum committee did not select for teaching any doctrinal material or teach particular beliefs of any church. It had the policy of having churches bring in any material desired to be used and to prevent any material being used that would bring up controversies or difficulties (R. 227). The committee could not accept everything that was offered as material to be used in the courses. At times material submitted was in conflict with teachings of the Episcopal Church and probably not acceptable to a good many (R. 228). The committee intends to protect the courses against antagonistic matter being taught and examines the material to be sure none is antagonistic to other religious organizations (R. 162).

All denominations were invited to participate in the religious education program (R. 159). The Council does not have representation from all denominations in Champaign. (R. 157). The Lutheran Church does not participate because it has its own religious instructions on Saturday mornings (R. 122). It has permission to use the school rooms for instruction when there are a sufficient number of children (R. 121). The Lutherans have indicated their intention to join (R. 159, 163, 167) and they will be welcome by the Council reserving the right that no prejudicial personalities or materials be put in the courses (R. 162). Lutherans already attend some of the classes (R. 122).

The Champaign system is modeled after a movement taking place throughout the country in 1009 school systems in 46 states (R. 160). Between 35 and 40 denominations are represented in the classes (R. 168). The Council includes

representatives of the Presbyterian, Baptist, Methodist, United Brethren, Christian, Episcopalian, Congregational, Disciples of Christ, Four Square Gospel and possibly other churches (R. 92, 129). It does not include Seventh Day Adventists or Quakers (R. 163).

The Council recommended that classes be held in school buildings if possible because of the convenience and safety of the children as compared with travel to the churches (R. 158). The reason for conducting these religious education classes in the schools instead of churches is because of the availability of the children of all denominations and religious groups (R. 166). Release of children to go to churches in many cases would be impractical (R. 242). The children are under the supervision of the teachers from the time they are in school until dismissal (R. 242).

In the Protestant group, instructors' salaries are provided by contributions of the ministers (R. 129) obtained from the several churches in proportion to their ability to contribute (R. 130, 157). A committee of the Council selected the teachers who were also approved by the superintendent (R. 130).

There are ten grade schools in Champaign (R. 267) and one junior high (R. 258). In 1944-1945 in junior high 134 of the 800 pupils registered for religious education; in the sixth grade 249 out of 295; in the fifth grade 206 out of 286; and in the fourth grade 196 out of 298 (R. 258). In all there were about 35 religious education classes. Of these 31 were Protestant (R. 91) taught by a Miss Chapin and a Mrs. Jorgenson (R. 91, 137). Two Catholic priests also taught (R. 91, 105). The Catholic instruction is in three schools at two of which there were no more than five pupils from the 4th, 5th and 6th grades. At the Junior High there were 10 or 12 pupils (R. 150). There was no Jewish instruction in 1944, 1945 or 1946. There was in 1941-1942 and 1943-1944, the classes being taught under the supervi-

sion of a rabbi (R. 224, 229). Fees collected by Miss Chapin from Catholic and Jewish children for materials are turned over to Catholic fathers and the Jewish rabbi respectively (R. 223-224).

Starting at 9:00 o'clock Monday morning Miss Chapin taught at Dr. Howard school, the 6th grade class (R. 91). In a normal class of 28 only 5 or 6 did not participate (R. 91). The same ratio existed in the next group. Students not taking religious instructions are not permitted to leave the premises (R. 115). If a particular church had only one or two pupils for instruction they would move out to a smaller space for such instruction R. 120). There was some testimony that those not participating went to the office with their teacher for regular class work (R. 92, 110), but they did not get more attention or instruction than those taking religious instructions because all children are given an equal amount of individual help such as was given to those children at this time. But there was other testimony that some of the teachers remained with the religious education classes (R. 92, 132, 133) and children who did not participate were sent out of the room with "material they needed to work, maybe recreational reading" (R. 132). In one case where non-participating children remained under the supervision of the teacher, they did things that were "interesting to them" (R. 147). The classes occupied thirty minutes of a fifty-minute period (R. 112, 116). The regular teacher could return to the class to preserve discipline (R. 115). This was the procedure throughout the day at the Dr. Howard School (R. 92). Miss Chapin did not have 100% attendance. Among those participating, there were included many different denominations but no Jews, Catholics or Seventh Day Adventists (R. 92). Miss Chapin is employed by the Council upon reference by the Committee (R. 92, 156). Her material is approved by a curriculum committee consisting of Presbyterian and Congregational

lay members (R. 93, 156). She did not always follow the outline (R. 98). She never used any form of social pressure or coercion to induce registration (R. 106).

Cards signed by the children's parents simply stated that they authorized instruction "Under the auspices of the Champaign Council of Religious Education" based on interdenominational, Protestant, Catholic or Jewish faiths (R. 94) and when the children registered their registration cards showed their particular denominations (R. 94, 145). The regular public school teachers distributed cards for expression of permission by parents after Miss Chapin, the religious instructor for the Protestant group named by the Council, delivered cards to them and in some cases they collected the cards for return to her (R. 94, 133, 148, 175). Some teachers took no part in the distribution of the cards (R. 114, 115). These cards also stated that a fee of 25 cents a semester would be charged for the cost of material used and named Miss Chapin as director. The card was headed "Champaign Council of Religious Education" and titled "Parents Request Card." The card in evidence (R. 176) was printed for Miss Chapin's use (R. 223). In May, 1945, the School Board mimeographed cards and was paid therefor by the Religious Council (R. 117, 223, 240), although there is no record of such payment (R. 215). The junior high school schedule card blanks do not have thereon the words "Religious Education;" the child has to write it in (R. 240).

Absentees from religious instructions are reported on the same sheet as in other classes to the superintendent's office (R. 224, 238). Enrollment is obtained from the cards in the elementary school and from the principal's office in junior high (R. 224).

The superintendent testified that teachers and principal were required to make arrangements with the religious education instructors. They came in a manner similar to

the music and art supervisors other than regular teachers (R. 117).

The superintendent does not determine who the religious teachers shall be (R. 118). The school board, however, has the unwritten reservation that the religious teacher should be qualified to teach. If the person is qualified to teach properly, the superintendent would permit the use of class rooms. But religious teachers are required to be approved by the superintendent (R. 118, 127). The board would want a qualified person who would know the correct usage of the English language, use good grammar, of the same general type as a class room teacher (R. 118). Proper application must be made to the school board following the regular procedure and each application will be given the same type of treatment that every other religious sect or denomination receives (R. 119, 123). The answer alleges only that free use of class rooms is extended to every faith represented by the Council (R. 42). Before the superintendent would grant permission he would want the names of the pupils, the school, and the number of pupils and also to make the regular arrangements (R. 126).

No more heat is required or occasioned in the public school buildings by the teaching of religious education (R. 238). The religious classes generally used no artificial light but did use the black board (R. 133, 134). The school board does not use any class room for religious education that is not used for other classes (R. 241), and the religious classes use the same desks and black boards as the other classes (R. 241).

In the fifth grade at the Dr. Howard School, in the first semester there were two pupils who did not take religious education, Terry McCollum and another; in the second only McCollum. In the first the teacher, Miss Taylor, took them to the music room (R. 132). In the second, McCollum went

to the music room alone; one day he had to sit in the corridor (R. 132, 175) but during the last two months of the second semester he went to another fifth grade class room (R. 255, 257). When McCollum went to the music room alone his teacher checked on him every ten minutes because he was a problem child (R. 255, 257).

McCollum was not accepted as a member of his class (R. 135) even before religious education classes started (R. 135). He was bellicose and the children did not like him (R. 136). His teacher suggested to his mother that his joining the religious group might help him (R. 136). Part of the time the regular teacher sat at her desk in the room where religious education was being given observing what was being taught (R. 133). When the children teased McCollum, assuming he was sitting in the corridor for punishment (R. 175, 193) his teacher urged him to take religion (R. 175). He wanted to take the course because he disliked being alone and was conspicuous (R. 177, 178). At the South Side School in the fourth grade McCollum, along with four or five others, did not take religion but went to the rest room ordinarily used by the teachers during that period (R. 262, 263). McCollum took religious education at the South Side School in the last half of the fourth grade (R. 178) and his mother consented because he asked to (R. 214, 232).

He wanted to take religious education and again he did not (R. 182). He tried to keep his atheism secret only from some because he was proud of his distinction in that respect, but on the other hand disliked being teased (R. 184, 186). The record also includes testimony that there were no comments or other adverse effects among the other children resulting from the failure of Terry McCollum or others to take a religious education course (R. 244, 254, 260, 266).

The circuit court, after trial, made findings of fact and conclusions of law and entered its order denying the peti-

tion (R. 89). It found that no public funds had been directly appropriated by the defendant for private use but to some slight extent the "defendant has indirectly appropriated public funds for the use of these classes, by the furnishing of rooms in public school buildings, light, heat, janitor service, and so forth" (R. 70). It concluded as a matter of law that there were no precedents on the question in the decisions of this Court (R. 77), and that no constitutional or statutory rights of the relator or her son had been violated by the Champaign system (R. 88-89).

The supreme court of Illinois held that the question was simply whether either the Federal or State constitutions, in their guaranty of religious freedom prohibit religious education under the plan as disclosed by this record. It accordingly affirmed the trial court on the ground that such classes "do not violate the freedom of conscience of any individual or group so long as the classes are conducted upon a purely voluntary basis" (R. 279). It affirmed the trial court January 22, 1947 (R. 280). The chief justice of that court allowed appeal April 16, 1947 (R. 283). Statement as to jurisdiction was filed April 18, 1947, and on June 2, 1947, this Court entered its order noting probable jurisdiction (R. 285).

Argument

The First Amendment provides that the Congress

> "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *"

In *Everson* v. *Board of Education*, 330 U. S. 1, the Court gave sanction to the use of public funds for the financial aid of private religious schools by providing transportation money to their pupils. This case involves an attempt by the Champaign authorities to introduce religious education into the public schools, and so support religion with public

funds. Both measures, we continue to maintain, violate the First Amendment, now recognized as incorporated in the Fourteenth. *Hamilton* v. *Regents*, 293 U. S. 245; *Palko* v. *Connecticut*, 302 U. S. 319; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624. Views of individuals or sects as to the wisdom of the separation of church and state so imposed or even as to its ultimate practicability may differ. See Bowers, Church and State in Education (1944). But the complete division of religious and civil authority which our forefathers prescribed in the First Amendment necessarily excludes every form of propagation of religion from the realm of things which may, directly or indirectly, be made public business and thereby be supported in whole or in part at taxpayer's expense.

The development of weekday classes in religious education has been mainly fostered by the International Council of Religious Education. It outlines the plan as follows:

> "Its [the weekday church school's] sessions are held in church buildings or in buildings owned or rented by the weekday church school council or, where possible and advisable, in public school rooms. These sessions are held during regular public school hours, or during the last period of the day, or after school. (These arrangements are known as 'released time', 'dismissed time' and 'free time,' respectively.) (Davis, *Weekday Classes in Religious Education*, Bulletin 1941, No. 3. U. S. Office of Education, p. 3.

The same Government bulletin amplifies the definition as follows (p. 22, note 15):

> Released—only pupils enrolled in the weekday religious education program leave their classes and return later in the day: other pupils remain. Dismissed—all pupils leave their classes whether or not they attend weekday classes in religious education.

The question here involved is therefore as to the propriety of "released time" religious education classes in public schools.

Since its origin in Gary, Indiana in 1913, the teaching of religious education in the public schools has spread until the results of a fair sampling indicate that in the elementary grades where released time is permitted 60 per cent of the pupils attend religious education classes; in the high schools, 34 per cent. Davis, *Weekday Classes in Religious Education*, Bulletin 1941, No. 3, p. 25. In 1940 approximately 40 per cent of the classes were held in public school buildings. *Ibid.*, p. 27. This steady growth and development cannot be ignored. The breach in the wall between church and state is being steadily widened and is but an intermediate step toward what is by its supporters regarded as the ultimate solution of "giving non-sectarian religious instruction in the public schools as an integral part of our system of public education, by teachers qualified to give it and employed and paid by the State." W. S. Fleming, D. D., *God in Our Public Schools*, 2d ed. (1944), p. 86.

In the *Everson* case, all the members of this Court appear to have been at one as to the broad principles involved and even as to the refinements of those principles. The majority opinion states the applicable law in terms that would seem to leave utterly without foundation any argument in support of the religious instruction in public schools here involved. The majority opinion of Mr. Justice Black states (pp. 15-16).

> "The 'establishment of religion' clause of the First Amendment means at least this: *Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.* Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion.

"* * * *No tax in any amount, large or small, can be levied to support any religious activities* or institutions, whatever they may be called, or *whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or group and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.' *Reynolds* v. *United States,* 98 U. S. 145, at 164. * * *

"* * * New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment *contribute tax-received funds to the support of an institution which teaches the tenets and faith of any church.*" (Emphasis supplied.)

With this statement of the law all dissenting justices agreed. See 330 U. S. 1, 19, 33. The division in that case appears to have resulted from: (1) Variant views as to the facts and (2) Divergence as to the limitations on the public welfare concept under the due process clause imposed by the specific prohibitions of the First Amendment. Because the question here is whether the Federal constitutional right was denied in substance or effect, the attention of the Court is again directed to the facts of record and to the anomalies necessarily incident to any extension to this case of the principles upon which the majority relied in the *Everson* case. *Carlson* v. *Washington ex rel. Curtiss,* 234 U. S. 103, 106; *Norris* v. *Alabama,* 294 U. S. 587, 590; *Pierre* v. *Louisiana,* 306 U. S. 354, 358; *Chambers* v. *Florida,* 309 U. S. 227, 229; *Smith* v. *Allwright,* 321 U. S. 649, 662; *Pennekamp* v. *Florida,* 328 U. S. 331, 335.

1. The resolution and plan of the Champaign school board constitute State action respecting an establishment of religion.

The facts of this case clearly demonstrate that the Champaign school board resolution provides for the teaching of religion in the public schools. Delegating part of its authority to control the curriculum in the public schools, the Board has permitted the institution of religious education which is identified with no particular sect or creed hitherto known as such.

In effect, for the majority, a new religion is established under authority of the school board. The Council of Religious Education has been given general control over the teaching of religion in the schools including the selection of teachers, although the latter is subject to approval of the superintendent (R. 118, 127, 130). Denominations applying for leave to teach are required to go through the regular procedure (R. 123) and work through the religious council (R. 125, 127, 162). The answer alleges that the religious education classes have been solely under the control and jurisdiction of the religious education council and that, since establishment of the classes, the defendant has made use of the classrooms "available to said Religious Education Council and *every faith represented thereby*" (R. 42) (Emphasis supplied). While all religious denominations are free to participate in the council (R. 159), representatives of the Protestant, Jewish and Catholic groups act together on the Council curriculum committee to examine personnel and curriculum to eliminate anything prejudicial to, or intolerant of, any of the groups (R. 157). It is the policy of the Council, at least in the so-called Protestant group, that no denominational belief or doctrinal material shall be taught and that policy is strictly adhered to (R. 107, 227). The material used in the Protestant classes is

general religious matter accepted by the great Christian church throughout the world; that is, the general run of over 200 Christian churches which are in agreement on fundamentals (R. 226). It is not the purpose of the Council to teach the doctrines of any particular church (R. 159) but to teach the things common to all participating denominations (R. 159). The objective of the whole program is tolerance (R. 159). It is the Council's attitude that the particular doctrines of particular religious sects are not its concern (R. 159). Nothing is being taught that is antagonistic to other religious organizations nor contrary to the creed of other sects (R. 162) but only the doctrines of members of the Council are taken into consideration for instruction (R. 163). As one result an interested Lutheran thought the teaching in the Protestant classes only partially in accord with the principles of the Lutheran Church because it omitted the divinity of Christ (R. 122). Possibly this flows from the Jewish and Unitarian non-recognition of such divinity (R. 218, 231) and the avowed purpose to avoid controversy.

It thus appears that the school board has granted to the Council of Religious Education and through it to the Protestant group therein authority to give educational classes in a non-doctrinal, non-sectarian religion consisting of religious matters accepted by "the general run of Christian churches which are in agreement on fundamentals * * * there are over 200. That includes the Catholic Church"[1] (R. 226). This body of common beliefs

[1] The Roman Catholic attitude on this point is stated in the American Ecclesiastical Review (Catholic University of America), February, 1947, (Vol. 116, No. 2) p. 141: "Similarly to characterize the relation between Catholics and Protestants as unity-in-diversity, is misleading, inasmuch as it implies that essentially Catholics are one with heretics, and that their diversities are accidental. Actually, the very opposite is the true situation. For however near an heretical sect may seem to be to the Catholic Church in its particular beliefs, a wide gulf separates them, inasfar as the divinely

is taught as a "Protestant" religion, in effect, a new religion evolved under the auspices of the school board and taught in the public schoolrooms. Thus the school board's "Protestant" religion represents what is, in effect, the greatest common denominator on which the majority of representatives on the council can agree; it is a moralistic religion directed to the strengthening of "character, honesty, truthfulness, dependability and such things as that" in order that democracy may be helped (R. 158-159). The representatives of what is apparently a majority in the community have agreed upon a minimum of religious teachings which they deem proper to be taugh in the public schools.[2] This curriculum of religious instruction is no less propagation of religion because it teaches the doctrines of no particular church (R. 159). "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded

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established means whereby the message of God is to be communicated to souls—the infallible magisterium of the Church—is rejected by every heretical sect. By telling Protestants that they are one with us in certain beliefs, in such wise as to give the impression that we regard this unity as the predominant feature of our relation with them, we are actually misleading them regarding the true attitude of the Catholic Church toward those who do not acknowledge her teaching authority."

[2] The project bears a striking resemblance to a similar plan of which Madison wrote Edward Everett: "I recollect to have seen, many years ago, a project of a prayer by Governor Livingston, father of the present Judge, intended to comprehend and conciliate college students of every Christian denomination by a form composed wholly of texts and phrases of Scripture. If a trial of the expedient was ever made, it must have failed, notwithstanding its winning aspect, from the single cause that many sects reject all set forms of worship.

"The settled opinion here is that religion is essentially distinct from civil government, and exempt from its cognizance; that a connection between them is injurious to both; that a legal establishment of religion without a toleration could not be thought of, and with a toleration, is no security for public quiet and harmony, but rather a source itself of discord and animosity." Writings of James Madison (ed. G. Hunt), Vol. IX, pp. 126-128.

with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter." *Davis* v. *Beason*, 133 U. S. 333, 342.

It also seems clear that the Council of Religious Education in exercising the authority delegated to it by the school board is properly to be classified as a representative of the State and that the Council's acts in determining curriculum and in selecting teachers are State action within the meaning of the Fourteenth Amendment. *Nixon* v. *Condon*, 286 U. S. 73, 88-89; *United States* v. *Classic*, 313 U. S. 299, 326; *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212, 219 (C. C. A. 4, 1945) cert. denied 326 U. S. 721.

Under the plan here involved a taxpayer is compelled to contribute to the support of instruction in religion in which he does not believe. The court below sought to obviate this difficulty on the theory that the use of the class-room for religious rather than secular study represented no additional out-of-pocket expense to the school board or to the public. But this argument is untenable with respect to the Federal constitutional question. This Court long ago ruled that it is not a sufficient reason for excluding from consideration expenses which are none the less existent because they are applicable to all uses of the property instead of being exclusively incurred in the particular use in question and would still have been incurred in the absence of the particular use. When conclusions are based on cost the entire cost must be taken into account. *Northern Pac. Ry.* v. *North Dakota*, 236 U. S. 585, 596-597; *Mississippi R. R. Comm.* v. *Mobile & Ohio R. R. Co.*, 244 U. S. 383, 395. Surely the freedom of worship protected by the First Amendment is not less sacrosanct than the protection of property afforded by the due process clause of the Fourteenth Amendment alone and recognized in the cited cases.

The principle *de minimis* has no room for application here. As stated in *Boyd* v. *United States*, 116 U. S. 616, 635:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

As emphasized in Madison's Remonstrance, par. 3 (reprinted in the Appendix to the dissent in *Everson* v. *Board of Education*, 330 U. S. 1, 65-66):

> "Who does not see • • • That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

So here, if use of a public school classroom for 30 minutes per week is permissible, then so also is use for the three hours per week contemplated by the Minnesota statute (Minn. Stats. (1927) sec. 3080) and the five hours per week permitted in certain other school systems. See Davis, *Weekday Classes in Religious Education*, Bulletin 1941 No. 3, p. 29.

Aside from the direct aid to propagation of the Council's religious teachings, and to propagation of the beliefs of such individual sects as are willing to avail of the opportunity to use the public school rooms upon the conditions

imposed, there results another valuable aid which while indirect is nevertheless real. By virtue of the Champaign program it is plain that the parochial or church schools and churches will *pro tanto* be relieved of the expense of opening their schools on Saturday and Sunday for instruction of public school students. In this way too they are aided by tax-collected money of members of other sects or non-believers in their propagation of religious doctrines to which the latter do not subscribe. See Edward R. Lewis, "The Threat in the School Aid Bills" *The Christian Century*, Vol. 64, p. 652-653 (May 21, 1947).

The only feature that could make the action of the school board in this case more plainly a law relating to the establishment of religion would be the payment of the religious instructors from public funds. If by merely making attendance at religious instruction voluntary and paying the religious instructors from private sources, a school can avoid the proscriptions of the First Amendment, it would seem that the present parochial and church schools of any sect could qualify for public support. All that would be needed is to make religious instruction of the individual pupil subject to the will of the parents and arrange to have the religious instructors paid from other sources. Cf. *State ex rel. Johnson* v. *Boyd*, 217 Ind. 348; *Hysong* v. *Gallitzin*, 164 Pa. 629.

There would then be no fundamental difference between public schools and the various church or parochial schools except as to administrative agency. Sooner or later the state would be forced to abdicate the field of education to non-public agencies, retaining only the function of tax gatherer for a church administered system of education; or else the state will be forced to take over and integrate church and public schools. In either case the result would be a virtual merger of church and state.

But the First Amendment means that neither a single sect, nor two or more sects nor all of the sects put together have a right to draw money under any guise whatsoever from the public treasury to promote their enterprises, religious, educational or eleemosynary. No citizen or religious minority can be compelled to join in a community effort to teach religion in the schools. And the objection that they are here, in effect, being forced by public taxes to help maintain church functions cannot be answered by saying that they might enjoy the same privilege to instruct in the public schools in their particular beliefs. As stated in the preamble to the Virginia Bill for Religious Freedom (12 Hen. Stats. (1823) 84, 85):

> "• • • even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind. • • •"

Nor is the objection obviated by the provision that attendance at the religious instruction classes is voluntary. Compulsory attendance requirements had been repealed in Virginia long before 1784 when the Assessment Bill was proposed and 1786 when the Virginia Bill for Religious Freedom was enacted. Compulsory attendance was not, and for a long time had not been, an issue at the time of the adoption of the First Amendment. See Cobb, Rise of Religious Liberty in America (1902), pp. 491-493.

Religion is voluntary. But here public moneys are raised by force of taxation levied alike on those who have religion

or those who have none. And when religion invokes the taxing power of the state to advance any of the institutions of the church, then religion denies its voluntary nature.

Here the State takes a direct concern in the teaching of religion, directing the principals and teachers, and authorizing representatives of the Religious Council, to arrange for time and place of utilization of public school facilities, passing on the suitability of teachers and delegating to the Council of Religious Education authority to determine what religious doctrines shall be taught in the public school buildings. Clearly the resolution and plan here involved constitute a law respecting an establishment of religion within the meaning of the First Amendment.

2. The impairment of the free exercise of religion by censorship demonstrates the evils of religious education in the schools.

Public funds are used in the erection and maintenance of the Champaign public schools free use of which is granted by the school board to sects for religious education. But such free use is limited to sects whose doctrines are deemed by the Council of Religious Education to be not antagonistic to other sects or likely to occasion controversy and to sects that are willing to forego instruction in such portions of their doctrines as may give rise to controversy when such instruction is given in the public schools. The censorship of the curriculum of the religious education classes in the schools, plain on the record in this case, not only constitutes a violation of the constitutional bar against laws prohibiting "the free exercise thereof"; it also is an acknowledgment and an adumbration of the evils that must flow from attempts to introduce religious education into the public schools.

As pointed out above, all religious denominations are free to participate in the Council of Religious Education (R. 159) but representatives of the Protestant, Jewish and

Catholic groups act together on the Council curriculum committee to eliminate anything prejudicial to, or intolerant of, any of the groups (R. 157). Individual Protestant sects may teach in the schools but the Council of Religious Education reserves the right to censor the material so that no prejudicial personalities or material will be put in the courses (R. 162) and nothing prejudicial to any one of the groups or intolerance to any of the groups shall be presented (R. 157). The religious council intends "to protect the courses against antagonistic matter being taught" (R. 162) and "to prevent any material being used that would bring up controversies or difficulties" (R. 227) and it has done so (R. 228).

Under these regulations, a sect that might consider conducting a course in the doctrines of the particular denomination is subjected to the threat of censorship as a condition of the exercise of the right to teach such doctrines. Religious teaching having been made a public affair by taxing citizens of one belief to aid another, and those of no faith to aid all, it thus has been treated as losing its protection as a private matter against infringements imposed by the State. As said in *Wickard* v. *Filburn*, 317 U. S. 111, 131: "It is hardly lack of due process for the Government to regulate that which it subsidizes." Here the alleged freedom of all sects to conduct classes in the schools is illusory. The alleged voluntary choice in religious education is not between conducting and attendance upon classes in the so-called "Protestant" religion, established by the religious council, and any other set of beliefs but between the prescribed "Protestant" curriculum and the teachings of any other sect modified, however, to exclude therefrom any teachings that might be regarded as antagonistic to other sects and denominations.[2] This is no free-

[2] The antagonistic teachings of the Jehovah's Witnesses would seem plainly to be barred under the announced principles of the Council of Re-

dom of choice at all. As stated in the preamble to the Virginia Bill for Religious Liberty (12 Hen. Stat. 84): "To suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession of propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty." *Reynolds* v. *United States*, 98 U. S. 145, 163. The censorship exercised under the authority of the school board is contrary to the basic philosophy of the Bill of Rights. A community may not suppress the dissemination of views because they are unpopular, annoying or distasteful. The admitted censorship of the Council of Religious Education is therefore a clear abridgement of the freedom of religion. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116; *Largent* v. *Texas*, 318 U. S. 418, 422.

The Council of Religious Education undoubtedly had sound basis in fact for their evident fears that the teaching

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ligious Education. See *Cantwell* v. *United States*, 310 U. S. 296, 301; *Douglas* v. *Jeannette*, 319 U. S. 157, 170 *et seq.*

The record is silent as to the degree in which Catholic and Jewish teachings were modified. See R. 150-151. However, they also would seem to fall within the ban as to some of their teachings. For example, the Catholic church, while recognizing (1) The *civil right* of every American to choose his religion; (2) The *moral right* of every person enjoying the use of reason to choose his religion in that there can be no rightful attachment to a religious body other than by way of a free choice; and (3) The *civil right* of every American to choose a religion forbidden by God, also teaches that—

"(4) It is *objectively and morally wrong* for any human being to disregard or to disobey a command issued by God himself, when that command is directed to all men and when it is brought to the attention of mankind with adequate clarity. • • • Hence, *since there is a real and objectively manifest divine precept that all men live within the Catholic Church, it is objectively a moral wrong for any American or for that matter, for anyone else, to adopt a non-Catholic religion.* If through no fault of his own, a person does not realize the existence of this divine command, he cannot and will not be blamed for living other than as a Catholic. If, however, a man is vincibly ignorant of the divine command, or if, *a fortiori*, he knows of its existence and refuses to obey it, his subjective attitude is morally wrong." American Ecclesiastical Review (Catholic University of America), Vol. 115, No. 4 (1946), pp. 298-300. (Last emphasis supplied.)

in full of the doctrines of one or more of the sects which might seek to teach in the schools would engender discussion and controversies among the pupils. In fact it is hardly reasonable to believe that such result would not follow. But religious liberty is essentially the right of nonconformity. A man who is not free to practice his religion, to propagate it and to discuss it, cannot really be free at all.

So here, even had there been no proof of the exercise or abuse of its asserted power of censorship by the Council of Religious Education, the resolution and plan of the school board is nevertheless subject to attack on its face. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of religion. The evil of censorship includes those who remain silent rather than risk publicity or censure. *Thornhill* v. *Alabama*, 310 U. S. 88, 97; *Schneider* v. *State*, 308 U. S. 147, 162-165; *Hague* v. *C. I. O.*, 307 U. S. 496, 516; *Lovell* v. *Griffin*, 303 U. S. 444, 451. To proscribe or censor the dissemination of doctrines or arguments which do not transgress moral limits is to destroy the principal bases of democracy—knowledge and discussion. "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Martin* v. *Struthers*, 318 U. S. 141, 143; *Lovell* v. *Griffin*, 303 U. S. 444, 451; *Follett* v. *McCormick*, 321 U. S. 573, 577. The same principle underlies the freedoms of speech and the press. *Thornhill* v. *Alabama*, 310 U. S. 88, 95, 97; *Hague* v. *C. I. O.*, 307 U. S. 496, 516; *Schneider* v. *State*, 308 U. S. 147, 161; *A. F. of L.* v. *Swing*, 312 U. S. 321, 326; *Bridges* v. *California*, 314 U. S. 252, 265; *Cafeteria Union* v. *Angelos*, 320 U. S. 293.

But the religious freedom guaranteed by the First Amendment does not rest alone upon the theory that public intel-

ligence must have the benefit of all competing doctrines in order successfully to attain the ends of democratic government through majority rule. In matters of religion, everyone is in the minority. The right of conscience guaranteed rests on a recognition of the supremacy dignity of man and of the necessity to protect his basic rights against the majority. As Mr. Justice Stone said in his famous dissent in *Minersville School District* v. *Gobitis*, 316 U. S. 586, 606:

> "The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey if it is to adhere to that justice and moderation without which no free government can exist."

In *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 637-638, this Court said:

> "Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party or faction * * *
>
> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right * * * to freedom of worship * * * may not be submitted to vote; they depend on the outcome of no election."

(p. 642):

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."

It must necessarily be concluded that whether teaching of religion in the public schools be regarded as a constitutional right or as merely a privilege, the condition upon which permission so to teach is here granted—submission to censorship of curriculum—is invalid because it requires relinquishment of constitutional rights. *Frost* v. *Railroad Commission*, 271 U. S. 583, 593-599.

But the Council of Religious Education was conscious of the dangers of religious distinctions and differentiation among children of tender years; so conscious that it chose to invoke censorship in religion rather than run the risks inherent in teaching the controversial subjects of religious belief, the tenets which are the chief distinction between the sects. Thus the very proponents of religious school training in effect admit that exercise of the constitutional right to propagate religious beliefs can not, as a practical manner, in its full scope be permitted to all the sects in the public schools, without engendering disruptive differences among the children and consequent religious controversy among the parents. The result is to destroy the privilege of non-conformity which is the very essence of the constitutional right and necessarily to create among the school children the impression that our vaunted Bill of Rights is in some aspects at least a mere set of platitudes.

Conclusion

The First Amendment confers no authority: it is strictly a limitation of power. By it—

> "man's relation to his God were made no concern of the State. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views." (*United States* v. *Ballard*, 322 U. S. 78, 87).

We fully agree that the religious instruction of the child should be given along with its secular training, but this does

not mean that it must be given by the same persons and in the same place. "The only construction that can be placed upon Protestant advocacy of sectarianism in public school education is an admission of weakness. Are Protestant parents unable to lead their children toward religion in their own homes? And what of the churches? If Sunday school attendance has fallen off to an alarming extent what is the reason for it?" Henry J. Williamson, *Religion and the Public Schools*, The Churchman (August, 1947) Vol. 61, No. 14, pp. 10-11.

All the duties of parents and functions of the home are not lightly to be shifted to the public schools, and certainly not when to do so violates the long-established interpretation of the First Amendment. To now break down the separation between church and State that has hitherto preserved the public schools from sectarian teaching can serve only to reopen a Pandora's box of religious strife and bigotry. It was the intention of the men who framed the Constitution to avoid all the evils of religious controversy. No struggle can approximate the bitterness of a religious fight. Once let the public schools be made a battle field on this matter and a new qualification is created for members of local school boards, injecting into school elections an element obviously detrimental to the general welfare. It would indeed be the beginning of religion in our civil affairs.

It is submitted that the decision of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

HOMER CUMMINGS,
WILLIAM D. DONNELLY,
Counsel for General Conference of Seventh Day Adventists.

December, 1947.

Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS ex rel. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, and ELMER C. BASH and ALICE J. BASH, and WANDA I. BASH, a minor, by ELMER C. BASH, her father and next friend,

Appellees.

MOTION FOR LEAVE TO FILE STATEMENT *AMICUS CURIAE*

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New York 17, N. Y.

Supreme Court of the United States

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Appellees.

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To the Honorable Supreme Court of the United States:

The undersigned, The American Ethical Union, is a national association of Societies for Ethical Culture. Its purpose is to bring into close fellowship of thought and action existing Ethical Societies and to promote the establishment of new societies. It is thus devoted, on a national scale, as is each society in its local setting, to the promotion of the knowledge, the love and the practice of the right in all the relationships of life. It asserts the supreme importance of the ethical factor in all the relations of life and affirms the belief that the greatest spiritual values are to be found in man's relationship to man. Through its religious and educational programs it seeks to make the individual more adequate in his personal relationships and better able to contribute to the life of his community.

We have read the brief *amici curiae* filed by the Synagogue Council of America and the National Community Relations Advisory Council. We endorse the views expressed in that brief and respectfully move this Court for leave to adopt this brief as our own.

Dated, November 18, 1947.

HERBERT A. WOLFF,
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Frankfurter pp. 1-9

SUPREME COURT OF THE UNITED STATES

No. 90.—October Term, 1947.

People of the State of Illinois ex rel. Vashti McCollum, Appellant, *v.* Board of Education of School District No. 71, Champaign County, Illinois et al. | Appeal from the Supreme Court of the State of Illinois.

[March 8, 1948.]

Mr. Justice Black delivered the opinion of the Court.

This case relates to the power of a state to utilize its tax-supported public school system in aid of religious instruction insofar as that power may be restricted by the First and Fourteenth Amendments to the Federal Constitution.

The appellant, Vashti McCollum, began this action for mandamus against the Champaign Board of Education in the Circuit Court of Champaign County, Illinois. Her asserted interest was that of a resident and taxpayer of Champaign and of a parent whose child was then enrolled in the Champaign public schools. Illinois has a compulsory education law which, with exceptions, requires parents to send their children, aged seven to sixteen, to its tax-supported public schools where the children are to remain in attendance during the hours when the schools are regularly in session. Parents who violate this law commit a misdemeanor punishable by fine unless the children attend private or parochial schools which meet educational standards fixed by the State. District boards of education are given general supervisory powers over the use of the public school buildings within the school districts. Ill. Rev. Stat. ch. 122, §§ 123, 301 (1943).

Appellant's petition for mandamus alleged that religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during

the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law. The petitioner charged that this joint public-school religious-group program violated the First and Fourteenth Amendments to the United States Constitution. The prayer of her petition was that the Board of Education be ordered to "adopt and enforce rules and regulations prohibiting all instruction in and teaching of all religious education in all public schools in Champaign District Number 71, . . . and in all public school houses and buildings in said district when occupied by public schools."

The board first moved to dismiss the petition on the ground that under Illinois law appellant had no standing to maintain the action. This motion was denied. An answer was then filed, which admitted that regular weekly religious instruction was given during school hours to those pupils whose parents consented and that those pupils were released temporarily from their regular secular classes for the limited purpose of attending the religious classes. The answer denied that this coordinated program of religious instruction violated the State or Federal Constitution. Much evidence was heard, findings of fact were made, after which the petition for mandamus was denied on the ground that the school's religious instruction program violated neither the federal nor state constitutional provisions invoked by the appellant. On appeal the State Supreme Court affirmed. 396 Ill. 14. Appellant appealed to this Court under 28 U. S. C. § 344 (a), and we noted probable jurisdiction. 332 U. S. —.

The appellee presses a motion to dismiss the appeal on several grounds, the first of which is that the judgment of the State Supreme Court does not draw in question the "validity of a statute of any State" as required by

28 U. S. C. § 344 (a). This contention rests on the admitted fact that the challenged program of religious instruction was not expressly authorized by statute. But the State Supreme Court has sustained the validity of the program on the ground that the Illinois statutes granted the board authority to establish such a program. This holding is sufficient to show that the validity of an Illinois statute was drawn in question within the meaning of 28 U. S. C. § 344 (a). *Hamilton* v. *Regents of U. of Cal.*, 293 U. S. 245, 258. A second ground for the motion to dismiss is that the appellant lacks standing to maintain the action, a ground which is also without merit. *Coleman* v. *Miller*, 307 U. S. 433, 443, 445, 464. A third ground for the motion is that the appellant failed properly to present in the State Supreme Court her challenge that the state program violated the Federal Constitution. But in view of the express rulings of both state courts on this question, the argument cannot be successfully maintained. The motion to dismiss the appeal is denied.

Although there are disputes between the parties as to various inferences that may or may not properly be drawn from the evidence concerning the religious program, the following facts are shown by the record without dispute.[1]

[1] Appellant, taking issue with the facts found by the Illinois courts, argues that the religious education program in question is invalid under the Federal Constitution for any one of the following reasons: (1) In actual practice certain Protestant groups have obtained an overshadowing advantage in the propagation of their faiths over other Protestant sects; (2) the religious education program was voluntary in name only because in fact subtle pressures were brought to bear on the students to force them to participate in it; and (3) the power given the school superintendent to reject teachers selected by religious groups and the power given the local Council on Religious Education to determine which religious faiths should participate in the program was a prior censorship of religion.

In view of our decision we find it unnecessary to consider these arguments or the disputed facts upon which they depend.

In 1940 interested members of the Jewish, Roman Catholic, and a few of the Protestant faiths formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades four to nine inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend;[2] they were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools.[3] The classes were taught in three

[2] The Supreme Court described the request card system as follows: ". . . . Admission to the classes was to be allowed only upon the express written request of parents, and then only to classes designated by the parents . . . . Cards were distributed to the parents of elementary students by the public-school teachers requesting them to indicate whether they desired their children to receive religious education. After being filled out, the cards were returned to the teachers of religious education classes either by the public-school teachers or the children . . . ." On this subject the trial court found that ". . . those students who have obtained the written consent of their parents therefor are released by the school authorities from their secular work, and in the grade schools for a period of thirty minutes' instruction in each week during said school hours, and forty-five minutes during each week in the junior high school, receive training in religious education . . . . Certain cards are used for obtaining permission of parents for their children to take said religious instruction courses, and they are made available through the offices of the superintendent of schools and through the hands of principals and teachers to the pupils of the school district. Said cards are prepared at the cost of the council of religious education. The handling and distribution of said cards does not interfere with the duties or suspend the regular secular work of the employees of the defendant . . . ."

[3] The State Supreme Court said: "The record further discloses that the teachers conducting the religious classes were not teachers in the

separate religious groups by Protestant teachers,[4] Catholic priests, and a Jewish rabbi, although for the past several years there have apparently been no classes instructed in the Jewish religion. Classes were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.[5]

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public schools but were subject to the approval and supervision of the superintendent . . . ." The trial court found: "Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public school buildings said faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system." The president of the local school board testified: ". . . The Protestants would have one group and the Catholics, and would be given a room where they would have the class and we would go along with the plan of the religious people. They were all to be treated alike, with the understanding that the teachers they would bring into the school were approved by the superintendent . . . . The superintendent was the last word so far as the individual was concerned . . . ."

[4] There were two teachers of the Protestant faith. One was a Presbyterian and had been a foreign missionary for that church. The second testified as follows: "I am affiliated with the Christian church. I also work in the Methodist Church and I taught at the Presbyterian. I am married to a Lutheran."

[5] The director of the Champaign Council on Religious Education testified: ". . . If any pupil is absent we turn in a slip just like any teacher would to the superintendent's office. The slip is a piece of paper with a number of hours in the school day and a square, and the teacher of the particular room for the particular hour records the

The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson* v. *Board of Education*, 330 U. S. 1. There we said: "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[6] Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person

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absentees. It has their names and the grade and the section to which they belong. It is the same sheet that the geography and history teachers and all the other teachers use, and is furnished by the school . . . ."

[6] The dissent, agreed to by four judges, said: "The problem then cannot be cast in terms of legal discrimination or its absence. This would be true, even though the state in giving aid should treat all religious instruction alike . . . . Again, it was the furnishing of 'contributions of money for the propagation of opinions which he disbelieves' that the fathers outlawed. That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted. The Constitution requires, not comprehensive identification of state with religion, but complete separation." *Everson* v. *Board of Education*, 330 U. S. 1, 59, 60.

can be punished for entertaining or for professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[7] Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Id.* at 15–16. The majority in the *Everson* case, and the minority as shown by quotations from the dissenting views in our notes 6 and 7, agreed that the First Amendment's language, properly interpreted, had erected a wall of separation between Church and State. They disagreed as to the facts shown by the record and as to the proper application of the First Amendment's language to those facts.

Recognizing that the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and the minority in the *Everson* case, counsel for the respondents challenge those views as dicta and urge that we reconsider and repudiate them. They argue that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions. In addition they

[7] The dissenting judges said: "In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises . . . . Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teachings or observances, be the amount large or small." *Everson* v. *Board of Education*, 330 U. S. 1, 41, 52–53.

ask that we distinguish or overrule our holding in the *Everson* case that the Fourteenth Amendment made the "establishment of religion" clause of the First Amendment applicable as a prohibition against the States. After giving full consideration to the arguments presented we are unable to accept either of these contentions.

To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.

Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State.

The cause is reversed and remanded to the State Supreme Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 90.—October Term, 1947.

People of the State of Illinois ex rel. Vashti McCollum, Appellant, v. Board of Education of School District No. 71, Champaign County, Illinois et al. | Appeal from the Supreme Court of the State of Illinois.

[March 8, 1948.]

Mr. Justice Frankfurter delivered the following opinion, in which Mr. Justice Jackson, Mr. Justice Rutledge and Mr. Justice Burton join.*

We dissented in *Everson* v. *Board of Education*, 330 U. S. 1, because in our view the Constitutional principle requiring separation of Church and State compelled invalidation of the ordinance sustained by the majority. Illinois has here authorized the commingling of ~~religious~~ sectarian with secular instruction in the public schools. The Constitution of the United States forbids this.

This case, in the light of the *Everson* decision, demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and the Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an "established church." But agreement, in the abstract, that the First Amendment

*Mr. Justice Rutledge and Mr. Justice Burton also concurred in the Court's opinion.

was designed to erect a "wall of separation between Church and State," does not preclude a clash of views as to what the wall separates. Involved is not only the Constitutional principle but the implications of judicial review in its enforcement. Accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere phrase. We cannot illuminatingly apply the "wall-of-separation" metaphor until we have considered the relevant history of religious education in America, the place of the "released time" movement in that history, and its precise manifestation in the case before us.

To understand the particular program now before us as a conscientious attempt to accommodate the allowable functions of Government and the special concerns of the Church within the framework of our Constitution and with due regard to the kind of society for which it was designed, we must put this Champaign program of 1940 in its historic setting. Traditionally, organized education in the Western world was Church education. It could hardly be otherwise when the education of children was primarily study of the Word and the ways of God. Even in the Protestant countries, where there was a less close identification of Church and State, the basis of education was largely the Bible, and its chief purpose inculcation of piety. To the extent that the State intervened, it used its authority to further aims of the Church.

The emigrants who came to these shores brought this view of education with them. Colonial schools certainly started with a religious orientation. When the common problems of the early settlers of the Massachusetts Bay Colony revealed the need for common schools, the object was the defeat of "one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures."

The Laws and Liberties of Massachusetts, 1648 edition (Cambridge 1929) 47.[1]

The evolution of colonial education, largely in the service of religion, into the public school system of today is the story of changing conceptions regarding the American democratic society, of the functions of State-maintained education in such a society, and of the role therein of the free exercise of religion by the people. The modern public school derived from a philosophy of freedom reflected in the First Amendment. It is appropriate to recall that the Remonstrance of James Madison, an event basic in the history of religious liberty, was called forth by a proposal which involved support to religious education. See MR. JUSTICE RUTLEDGE'S opinion in the *Everson* case, *supra*, 330 U. S. at 36–37. As the momentum for popular education increased and in turn evoked strong claims for State support of religious education, contests not unlike that which in Virginia had produced Madison's Remonstrance appeared in various form in other States. New York and Massachusetts provide famous chapters in the history that established dissociation of religious teaching from State-maintained schools. In New York, the rise of the common schools led, despite fierce sectarian opposition, to the barring of tax funds to church schools, and later to any school in which sectarian doctrine was taught.[2] In Massachusetts, largely through the efforts of

[1] For an exposition of the religious origins of American education, see S. W. Brown, The Secularization of American Education (1912) cc. I, II; Knight, Education in the United States (2d rev. ed. 1941) cc. III, V; Cubberley, Public Education in the United States (1934) cc. II, III.

[2] See Boese, Public Education in the City of New York (1869) c. XIV; Hall, Religious Education in the Public Schools of the State and City of New York (1914) cc. VI, VII; Palmer, The New York Public School (1905) cc. VI, VII, X, XII. And see New York Laws 1842, c. 150, § 14, amended, New York Laws 1844, c. 320, § 12.

Horace Mann, all sectarian teachings were barred from the common school to save it from being rent by denominational conflict.[3] The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people. In sustaining Stephen Girard's will, this Court referred to the inevitable conflicts engendered by matters "connected with religious polity" and particularly "in a country composed of such a variety of religious sects as our country." *Vidal et al.* v. *Girard's Executors*, 2 How. 127, 198. That was more than one hundred years ago.

Separation in the field of education, then, was not imposed upon unwilling States by force of superior law. In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it binding upon the States, the basis of the restriction is the whole experience of our people. Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but especially through its educational agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people.[4] A totally different situation elsewhere, as illus-

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[3] S. M. Smith, The Relation of the State to Religious Education in Massachusetts (1926) c. VII; Culver, Horace Mann and Religion in Massachusetts Public Schools (1929).

[4] It has been suggested that secular education in this country is the inevitable "product of 'the utter impossibility of harmonizing multiform creeds.'" T. W. M. Marshall, *Secular Education in England and the United States*, 1 American Catholic Quarterly Review 278, 308. It is precisely because of this "utter impossibility" that the fathers put into the Constitution the principle of complete "hands-off," for a people as religiously heterogeneous as ours.

trated for instance by the English provisions for religious education in State-maintained schools, only serves to illustrate that free societies are not cast in one mould. See the Education Act of 1944, 7 and 8 Geo. VI, c. 31. Different institutions evolve from different historic circumstances.

It is pertinent to remind that the establishment of this principle of separation in the field of education was not due to any decline in the religious beliefs of the people. Horace Mann was a devout Christian, and the deep religious feeling of James Madison is stamped upon the Remonstrance. The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.

This development of the public school as a symbol of our secular unity was not a sudden achievement nor at-

tained without violent conflict.[5] While in small communities of comparatively homogeneous religious beliefs, the need for absolute separation presented no urgencies, elsewhere the growth of the secular school encountered the resistance of feeling strongly engaged against it. But the inevitability of such attempts is the very reason for Constitutional provisions primarily concerned with the protection of minority groups. And such sects are shifting groups, varying from time to time, and place to place, thus representing in their totality the common interest of the nation.

Enough has been said to indicate that we are dealing not with a full-blown principle, nor one having the definiteness of a surveyor's metes and bounds. But by 1875 the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation. In that year President Grant made his famous remarks to the Convention of the Army of the Tennessee:

> "Encourage free schools and resolve that not one dollar appropriated for their support shall be appropriated for the support of any sectarian schools. Resolve that neither the state nor the nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, or

[5] See Cubberley, Public Education in the United States (1934) pp. 230 *et seq.*; Zollmann, *The Relation of Church and State*, in Lotz and Crawford, Studies in Religious Education (1931) 403, 418 *et seq.*; Payson Smith, *The Public Schools and Religious Education*, in Religion and Education (Sperry, Editor, 1945) pp. 32 *et seq.*; also Mahoney, The Relation of the State to Religious Education in Early New York 1633–1825 (1941) c. VI; McLaughlin, A History of State Legislation Affecting Private Elementary and Secondary Schools in the United States, 1870–1945 (1946) c. I; and see note 10, *infra*.

atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and state forever separated." "The President's Speech at Des Moines," 22 *Catholic World* 433, 434–35 (1876).

So strong was this conviction, that rather than rest on the comprehensive prohibitions of the First and Fourteenth Amendments, President Grant urged that there be written into the United States Constitution particular elaborations, including a specific prohibition against the use of public funds for sectarian education,[6] such as had

[6] President Grant's Annual Message to Congress, December 7, 1875, 4 Cong. Rec. 175 *et seq.*; Ames, The Proposed Amendments to the Constitution of the United States during the First Century of its History, H. Doc. No. 353, Pt. 2, 54th Cong., 2d Sess., pp. 277–78. In addition to the first proposal, "The Blaine Amendment," five others to similar effect are cited by Ames. The reason for the failure of these attempts seems to have been in part "That the provisions of the State constitutions are in almost all instances adequate on this subject, and no amendment is likely to be secured." *Id.*

In the form in which it passed the House of Representatives, the Blaine Amendment read as follows: "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its

been written into many State constitutions.[7] By 1894, in urging the adoption of such a provision in the New York Constitution, Elihu Root was able to summarize a century of the nation's history: "It is not a question of religion, or of creed, or of party; it is a question of declaring and maintaining the great American principle of eternal separation between Church and State." Root, Addresses on Government and Citizenship, 137, 140.[8] The extent to which this principle was deemed a presupposition of our Constitutional system is strikingly illustrated by the fact that every State admitted into the Union since 1876 was com-

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interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested . . . ." H. Res. 1, 44th Cong., 1st Sess. (1876).

[7] See *Constitutions of the States and United States*, 3 Report of the New York State Constitutional Convention Committee (1938) Index, pp. 1766–67.

[8] It is worthy of interest that another famous American lawyer, and indeed one of the most distinguished of American judges, Jeremiah S. Black, expressed similar views nearly forty years before Mr. Root: "The manifest object of the men who framed the institutions of this country, was to have a *State without religion* and a *Church without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other . . . . Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate. For that reason they built up a wall of complete and perfect partition between the two." From *Religious Liberty* (1856) in Black, Essays and Speeches (1886) 51, 53; cf. Brigance, Jeremiah Sullivan Black (1934). While Jeremiah S. Black and Elihu Root had many things in common, there were also important differences between them, perhaps best illustrated by the fact that one became Secretary of State to President Buchanan, the other to Theodore Roosevelt. That two men, with such different political alignment, should have shared identic views on a matter so basic to the well-being of our American democracy affords striking proof of the respect to be accorded to that principle.

pelled by Congress to write into its constitution a requirement that it maintain a school system "free from sectarian control." [9]

Prohibition of the commingling of ~~religious~~ sectarian and secular instruction in the public school is of course only half the story. A religious people was naturally concerned about the part of the child's education entrusted "to the family altar, the church, and the private school." The promotion of religious education took many forms. Laboring under financial difficulties and exercising only persuasive authority, various denominations felt handicapped in their task of religious education. Abortive attempts were therefore frequently made to obtain public funds for religious schools.[10] But the major efforts of

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[9] 25 Stat. 676, 677, applicable to North Dakota, South Dakota, Montana and Washington, required that the constitutional conventions of those States "provide, by ordinances irrevocable without the consent of the United States and the people of such States . . . for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control . . . ." The same provision was contained in the Enabling Act for Utah, 28 Stat. 107, 108; Oklahoma, 34 Stat. 267, 270; New Mexico and Arizona, 36 Stat. 557, 559, 570. Idaho and Wyoming were admitted after adoption of their constitutions; that of Wyoming contained an irrevocable ordinance in the same terms. Wyoming Constitution, 1889, Ordinances, § 5. The Constitution of Idaho, while it contained no irrevocable ordinance, had a provision even more explicit in its establishment of separation. Idaho Constitution, 1889, art. IX, § 5.

[10] See, *e. g.*, the New York experience, including, *inter alia*, the famous Hughes controversy of 1840–42, the conflict culminating in the Constitutional Convention of 1894, and the attempts to restore aid to parochial schools by revision of the New York City Charter, in 1901, and at the State Constitutional Convention of 1938. See McLaughlin, A History of State Legislation Affecting Private Elementary and Secondary Schools in the United States, 1870–1945 (1946) pp. 119–25; Mahoney, The Relation of the State to Religious Education in Early New York 1633–1825 (1941) c. VI; Hall, Reli-

religious inculcation were a recognition of the principle of Separation by the establishment of church schools privately supported. Parochial schools were maintained by various denominations. These, however, were often beset by serious handicaps, financial and otherwise, so that the religious aims which they represented found other directions. There were experiments with vacation schools, with Saturday as well as Sunday schools.[11] They all fell short of their purpose. It was urged that by appearing to make religion a one-day-a-week matter, the Sunday school, which acquired national acceptance, tended to relegate the child's religious education, and thereby his religion, to a minor role not unlike the enforced piano lesson.

Out of these inadequate efforts evolved the week-day church school, held on one or more afternoons a week after the close of the public school. But children continued to be children; they wanted to play when school was out, particularly when other children were free to do so. Church leaders decided that if the week-day church school

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gious Education in the Public Schools of the State and the City of New York (1914) pp. 46–47; Boese, Public Education in the City of New York (1869) c. XIV; Compare New York Laws 1901, vol. 3, § 1152, p. 492, with amendment, *id.*, p. 688; see Nicholas Murray Butler, *Religion and Education* (Editorial) in 22 Educational Review 101, June, 1901; New York Times, April 8, 1901, p. 1, col. 1; April 9, 1901, p. 2, col. 5; April 19, 1901, p. 2, col. 2; April 21, 1901, p. 1, col. 3; Editorial, April 22, 1901, p. 6, col. 1.

Compare S. 2499, 79th Cong., 2d Sess., providing for Federal aid to education, and the controversy engendered over the inclusion in the aid program of sectarian schools, fully discussed in, *e. g.*, "The Nation's Schools," January through June, 1947.

[11] For surveys of the development of private religious education, see, *e. g.*, A. A. Brown, A History of Religious Education in Recent Times (1923); Athearn, Religious Education and American Democracy (1917); Burns and Kohlbrenner, A History of Catholic Education in the United States (1937); Lotz and Crawford, Studies in Religious Education (1931) Parts I and IV.

was to succeed, a way had to be found to give the child his religious education during what the child conceived to be his "business hours."

The initiation of the movement [12] may fairly be attributed to Dr. George U. Wenner. The underlying assumption of his proposal, made at the Interfaith Conference on Federation held in New York City in 1905, was that the public school unduly monopolized the child's time and that the churches were entitled to their share of it.[13] This, the schools should "release." Accordingly, the Federation, citing the example of the Third Republic of France,[14] urged that upon the request of their parents

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[12] Reference should be made to Jacob Gould Schurman, who in 1903 proposed a plan bearing close resemblance to that of Champaign. See Symposium, 75 The Outlook 635, 636, November 14, 1903; Crooker, Religious Freedom in American Education (1903) pp. 39 *et seq.*

[13] For the text of the resolution, a brief in its support, as well as an exposition of some of the opposition it inspired, see Wenner's book, Religious Education and the Public School (rev. ed. 1913).

[14] The French example is cited not only by Wenner but also by Nicholas Murray Butler, who thought released time was "restoring the American system in the state of New York." *The Place of Religious Instruction in Our Educational System*, 7 Vital Speeches 167, 168 (Nov. 28, 1940); see also Report of the President of Columbia University, 1934, pp. 22–24. It is important to note, however, that the French practice must be viewed as the result of the struggle to emancipate the French schools from control by the Church. The leaders of this revolution, men like Paul Bert, Ferdinand Buisson, and Jules Ferry, agreed to this measure as one part of a great step towards, rather than a retreat from, the principle of Separation. The history of these events is described in Muzzey, *State, Church, and School in France*, The School Review, March through June, 1911.

In effect, moreover, the French practice differs in crucial respects from both the Wenner proposal and the Champaign system. The law of 1882 provided that "Public elementary schools will be closed one day a week in addition to Sunday in order to permit parents, if they so desire, to have their children given religious instruction outside of school buildings." Law No. 11,696, March 28, 1882,

children be excused from public school on Wednesday afternoon, so that the churches could provide "Sunday school on Wednesday." This was to be carried out on church premises under church authority. Those not desiring to attend church schools would continue their normal classes. Lest these public school classes unfairly compete with the church education, it was requested that the school authorities refrain from scheduling courses or activities of compelling interest or importance.

The proposal aroused considerable opposition and it took another decade for a "released time" scheme to become part of a public school system. Gary, Indiana, inaugurated the movement. At a time when industrial expansion strained the communal facilities of the city, Superintendent of Schools Wirt suggested a fuller use of the school buildings. Building on theories which had become more or less current, he also urged that education was more than instruction in a classroom. The school was only one of several educational agencies. The library, the playground, the home, the church, all have their function in the child's proper unfolding. Accordingly, Wirt's plan sought to rotate the schedules of the children during the school-day so that some were in class, others were in the library, still others in the playground.

Bulletin des Lois, No. 690. This then approximates that aspect of released time generally known as "dismissed time." No children went to school on that day, and the public school was therefore not an alternative used to impel the children towards the religious school. The religious education was given "outside of school buildings."

The Vichy Government attempted to introduce a program of religious instruction within the public school system remarkably similar to that in effect in Champaign. The proposal was defeated by intense opposition which included the protest of the French clergy, who apparently feared State control of the Church. See Schwartz, *Religious Instruction under Pétain*, 58 Christian Century 1170, Sept. 24, 1941.

And some, he suggested to the leading ministers of the City, might be released to attend religious classes if the churches of the City cooperated and provided them. They did, in 1914, and thus was "released time" begun. The religious teaching was held on church premises and the public schools had no hand in the conduct of these church schools. They did not supervise the choice of instructors or the subject matter taught. Nor did they assume responsibility for the attendance, conduct or achievement of the child in a church school; and he received no credit for it. The period of attendance in the religious schools would otherwise have been a play period for the child, with the result that the arrangement did not cut into public school instruction or truly affect the activities or feelings of the children who did not attend the church schools.[15]

From such a beginning "released time" has attained substantial proportions. In 1914–15, under the Gary program, 619 pupils left the public schools for the church schools during one period a week. According to responsible figures almost 2,000,000 in some 2,200 communities participated in "released time" programs during 1947.[16] A movement of such scope indicates the importance of the problem to which the "released time" programs are directed. But to the extent that aspects of these programs are open to Constitutional objection, the more extensively the movement operates, the more ominous the breaches in the wall of separation.

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[15] Of the many expositions of the Gary plan, see, *e. g.*, A. A. Brown, *The Week-Day Church Schools of Gary, Indiana*, 11 Religious Education 5 (1916); Wirt, *The Gary Public Schools and the Churches*, *id.* at 221 (1916).

[16] See the 1947 Yearbook, International Council of Religious Education, p. 76; also New York Times, September 21, 1947, p. 22, col. 1.

Of course, "released time" as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some "released time" classes are under separate denominational auspices, others are conducted jointly by several denominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular "released time" program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court.[17]

[17] Respects in which programs differ include, for example, the amount of supervision by the public school of attendance and performance in the religious class, of the course of study, of the selection of teachers, methods of enrolment and dismissal from the secular classes; the amount of school time devoted to operation of the program; the extent to which school property and administrative machinery are involved; the effect on the public school program of the introduction of "released time"; the proportion of students who seek to be excused; the effect of the program on non-participants; the amount and nature of the publicity for the program in the public schools.

The studies of detail in "released time" programs are voluminous. Most of these may be found in the issues of such periodicals as The International Journal of Religious Education, Religious Education, and Christian Century. For some of the more comprehensive studies found elsewhere, see Davis, Weekday Classes in Religious Education, U. S. Office of Education Bulletin 1941, No. 3; Gorham, A Study of the Status of Weekday Church Schools in the United States (1934); Lotz, *The Weekday Church School*, in Lotz and Crawford, Studies in Religious Education (1931) c. XII;

The substantial differences among arrangements lumped together as "released time" emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. How does "released time" operate in Champaign? Public school teachers distribute to their pupils cards supplied by church groups, so that the parents may indicate whether they desire religious instruction for their children. For those desiring it, religious classes are conducted in the regular classrooms of the public schools by teachers of religion paid by the churches and appointed by them, but, as the State court found, "subject to the approval and supervision of the Superintendent." The courses do not profess to give secular instruction in subjects concerning religion. Their candid purpose is sectarian teaching. While a child can go to any of the religious classes offered, a particular sect wishing a teacher for its devotees requires the permission of the school superintendent "who in turn will determine whether or not it is practical for said group to teach in said school system." If no provision is made for religious instruction in the particular faith of a child, or if for other reasons the child is not enrolled in any of the offered classes, he is required to attend a regular school class, or a study period during which he is often left to his own devices. Reports of attendance in the religious classes are submitted by the religious instructor to the school authorities, and the child who fails to attend is presumably deemed a truant.

Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school sys-

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Forsyth, Week-Day Church Schools (1930); Settle, The Weekday Church School, Educational Bulletin No. 601 of The International Council of Religious Education (1930); Shaver, Present-Day Trends in Religious Education (1928) cc. VII, VIII; Gove, Religious Education on Public School Time (1926).

tem in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.[18] Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages.[19]

[18] It deserves notice that in discussing with the relator her son's inability to get along with his classmates, one of his teachers suggested that "allowing him to take the religious education course might help him to become a member of the group."

[19] The divergent views expressed in the briefs submitted here on behalf of various religious organizations, as *amici curiae*, in themselves

Mention should not be omitted that the integration of religious instruction within the school system as practiced in Champaign is supported by arguments drawn from educational theories as diverse as those derived from Catholic conceptions and from the writings of John Dewey.[20] Movements like "released time" are seldom

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suggest that the movement has been a divisive and not an irenic influence in the community: The American Unitarian Association; The General Conference of Seventh Day Adventists; The Joint Conference Committee on Public Relations set up by the Southern Baptist Convention, The Northern Baptist Convention, The National Baptist Convention Inc., and the National Baptist Convention; The Protestant Council of the City of New York; and The Synagogue Council of America and National Community Relations Advisory Council.

[20] There is a prolific literature on the educational, social and religious merits of the "released time" movement. In support of "released time" the following may be mentioned: The International Council of Religious Education, and particularly the writings of Dr. Erwin L. Shaver, for some years Director of its Department of Weekday Religious Education, in publications of the Council and in numerous issues of The International Journal of Religious Education (*e. g.*, *They Reach One-Third*, Dec., 1943, p. 11; *Weekday Religious Education Today*, Jan., 1944, p. 6), and Religious Education (*e. g.*, *Survey of Week-Day Religious Education*, Feb., 1922, p. 51; *The Movement for Weekday Religious Education*, Jan.-Feb., 1946, p. 6); see also Information Service, Federal Council of Churches of Christ, May 29, 1943. See also Cutton, *Answering the Arguments*, The International Journal of Religious Education, June, 1930, p. 9, and *Released Time*, *id.*, Sept., 1942, p. 12; Hauser, *"Hands Off the Public School!"*, Religious Education, Mar.-Apr., 1942, p. 99; Collins, *Release Time for Religious Instruction*, National Catholic Education Association Bulletin, May, 1945, pp. 21, 27-28; Weigle, *Public Education and Religion*, Religious Education, Apr.-June, 1940, p. 67; Nicholas Murray Butler, *The Place of Religious Instruction in Our Educational System*, 7 Vital Speeches 167 (Nov. 28, 1940); Howlett, *Released Time for Religious Education in New York City*, 64 Education 523, May, 1944; Blair, *A Case for the Church School*, 7 Frontiers of Democracy 75, Dec. 15, 1940; cf. Allred, Legal Aspects of Release Time (National Catholic Welfare Conference, 1947). Favorable views are also cited in the studies in note 17, *supra*. Many not opposed to "released time" have declared it "hardly

single in origin or aim. Nor can the intrusion of religious instruction into the public school system of

enough" or "pitifully inadequate." *E. g.*, Fleming, God in Our Public Schools (2d ed. 1944) pp. 80–86; Howlett, *Released Time for Religious Education in New York City*, Religious Education, Mar.–Apr., 1942, p. 104; Cavert, *Points of Tension Between Church and State in America Today*, in Church and State in the Modern World (1937) 161, 168; F. E. Johnson, The Church and Society (1935) 125; Hubner, Professional Attitudes toward Religion in the Public Schools of the United States Since 1900 (1944) 108–109, 113; cf. Ryan, *A Protestant Experiment in Religious Education*, The Catholic World, June, 1922; Elliott, *Are Weekday Church Schools the Solution?*, The International Journal of Religious Education, Nov., 1940, p. 8; Elliott, *Report of the Discussion*, Religious Education, July–Sept., 1940, p. 158.

For opposing views, see V. T. Thayer, Religion in Public Education (1947) cc. VII, VIII; Moehlman, The Church as Educator (1947) c. X; Chave, A Functional Approach to Religious Education (1947) 104–107; A. W. Johnson, The Legal Status of Church-State Relationships in the United States (1934) 129–130; Newman, The Sectarian Invasion of Our Public Schools (1925). See also Payson Smith, *The Public Schools and Religious Education*, in Religion and Education (Sperry, Editor, 1945) 32, 42–47; Herrick, *Religion in the Public Schools of America*, 46 Elementary School Journal 119, Nov., 1945; Kallen, *Churchmen's Claims on the Public School*, The Nation's Schools, May, 1942, p. 49; June, 1942, p. 52. And cf. John Dewey, *Religion in Our Schools* (1908), reprinted in 2 Characters and Events (1929) 504, 508, 514. "Released time" was introduced in the public schools of the City of New York over the opposition of organizations like the Public Education Association and the United Parents Associations.

The arguments and sources pro and con are collected in Hubner, Professional Attitudes toward Religion in the Public Schools in the United States since 1900 (1944) 94 *et seq.* And see the symposia, *Teaching Religion in a Democracy*, The International Journal of Religious Education, Nov., 1940, pp. 6–16; *The Aims of Week-Day Religious Education*, Religious Education, Feb., 1922, p. 11; *Released Time in New York City*, *id.*, Jan.–Feb., 1943, p. 15; *Progress in Week-day Religious Education*, *id.*, Jan.–Feb., 1946, p. 6; *Can Our Public Schools Do More about Religion?*, 125 Journal of Education 245, Nov., 1942, *id.* at 273, Dec., 1942; *Religious Instruction on School Time*, 7 Frontiers of Democracy 72–77, Dec. 15, 1940; and the articles in 64 Education 519 *et seq.*, May, 1944.

Champaign be minimized by saying that it absorbs less than an hour a week; in fact, that affords evidence of a design constitutionally objectionable. If it were merely a question of enabling a child to obtain religious instruction with a receptive mind the thirty or forty-five minutes could readily be found on Saturday or Sunday. If that were all, Champaign might have drawn upon the French system, known in its American manifestation as "dismissed time," whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school.[21] The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning. To speak of "released time" as being only half or three quarters of an hour is to draw a thread from a fabric.

We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as "released time," present situations differing in aspects that may well be constitutionally crucial. Different forms which "released time" has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid "released time" program. We find that the basic Constitutional principle of absolute separation was violated when the State of Illinois,

[21] See note 14, *supra*. Indications are that "dismissed time" is used in an inconsiderable number of the communities employing released time. Davis, Weekday Classes in Religious Education, U. S. Office of Education Bulletin 1941, No. 3, p. 22; Shaver, *The Movement for Weekday Religious Education*, Religious Education, Jan.–Feb., 1946, pp. 6, 9.

speaking through its Supreme Court, sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement.

Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a "wall of separation," not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. "The great American principle of eternal separation"—Elihu Root's phrase bears repetition—is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.

We renew our conviction that "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion." *Everson* v. *Board of Education*, 330 U. S. at 59. If nowhere else, in the relation between Church and State, "good fences make good neighbors."

SUPREME COURT OF THE UNITED STATES

No. 90.—October Term, 1947.

People of the State of Illinois, ex rel. Vashti McCollum, Appellant, *v.* Board of Education of School District No. 71, Champaign County, Illinois, et al.	Appeal from the Supreme Court of the State of Illinois.

[March 8, 1948.]

Mr. Justice Jackson, concurring.

I join the opinion of Mr. Justice Frankfurter, and concur in the result reached by the Court, but with these reservations: I think it is doubtful whether the facts of this case establish jurisdiction in this Court, but in any event that we should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain. I make these reservations a matter of record in view of the number of litigations likely to be started as a result of this decision.

A Federal Court may interfere with local school authorities only when they invade either a personal liberty or a property right protected by the Federal Constitution. Ordinarily this will come about in either of two ways:

First. When a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting such unconstitutional requirement. We may then set him free or enjoin his prosecution. Typical of such cases was *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624. There penalties were threatened against both parent and child for refusal of the latter to perform a compulsory ritual which offended his convictions. We intervened to shield them against the penalty. But here,

complainant's son may join religious classes if he chooses and if his parents so request, or he may stay out of them. The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground.

Second. Where a complainant is deprived of property by being taxed for unconstitutional purposes, such as directly or indirectly to support a religious establishment. We can protect a taxpayer against such a levy. This was the *Everson Case*, 330 U. S. 1, as I saw it then and see it now. It was complained in that case that the school treasurer drew a check on public funds to reimburse parents for a child's bus fare if he went to a Catholic parochial school or a public school, but not if he went to any other private or denominational school. Reference to the record in that case will show that the School District was not operating busses, so it was not a question of allowing Catholic children to ride publicly owned busses along with others, in the interests of their safety, health or morals. The child had to travel to and from parochial school on commercial busses like other paying passengers and all other school children, and he was exposed to the same dangers. If it could, in fairness, have been said that the expenditure was a measure for the protection of the safety, health or morals of youngsters, it would not merely have been constitutional to grant it; it would have been unconstitutional to refuse it to any child merely because he was a Catholic. But in the *Everson Case* there was a

direct, substantial and measurable burden on the complainant as a taxpayer to raise funds that were used to subsidize transportation to parochial schools. Hence, we had jurisdiction to examine the constitutionality of the levy and to protect against it if a majority had agreed that the subsidy for transportation was unconstitutional.

In this case, however, any cost of this plan to the taxpayers is incalculable and negligible. It can be argued, perhaps, that religious classes add some wear and tear on public buildings and that they should be charged with some expense for heat and light, even though the sessions devoted to religious instruction do not add to the length of the school day. But the cost is neither substantial nor measurable, and no one seriously can say that the complainant's tax bill has been proved to be increased because of this plan. I think it is doubtful whether the taxpayer in this case has shown any substantial property injury.

If, however, jurisdiction is found to exist, it is important that we circumscribe our decision with some care. What is asked is not a defensive use of judicial power to set aside a tax levy or reverse a conviction, or to enjoin threats of prosecution or taxation. The relief demanded in this case is the extraordinary writ of mandamus to tell the local Board of Education what it must do. The prayer for relief is that a writ issue against the Board of Education "ordering it to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools . . . and in all public school houses and buildings in said district when occupied by public schools." The plaintiff, as she has every right to be, is an avowed atheist. What she has asked of the courts is that they not only end the "released time" plan but also ban every form of teaching which suggests or recognizes that there is a God. She would ban all teaching of the Scriptures. She especially mentions as an example of invasion of her rights "having

pupils learn and recite such statements as, 'The Lord is my Shepherd, I shall not want.'" And she objects to teaching that the King James version of the Bible "is called the Christian's Guide Book, the Holy Writ and the Word of God," and many other similar matters. This Court is directing the Illinois courts generally to sustain plaintiff's complaint without exception of any of these grounds of complaint, without discriminating between them and without laying down any standards to define the limits of the effect of our decision.

To me, the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements. Authorities list 256 separate and substantial religious bodies to exist in continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

While we may and should end such formal and explicit instruction as the Champaign plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possble, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics,

physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a "science" as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found "a Church without a Bishop and a State without a King," is more than I know. It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohamet. When instruction turns to proselyting and imparting knowledge

becomes evangelism is, except in the crudest cases, a subtle inquiry.

The opinions in this case show that public educational authorities have evolved a considerable variety of practices in dealing with the religious problem. Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that, no matter what practice prevails, there will be many discontented and possibly belligerent minorities. We must leave some flexibility to meet local conditions, some chance to progress by trial and error. While I agree that the religious classes involved here go beyond permissible limits, I also think the complaint demands more than plaintiff is entitled to have granted. So far as I can see this Court does not tell the State court where it may stop, nor does it set up any standards by which the State court may determine that question for itself.

The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine as demanded by complainant and apparently approved by the Court, applicable alike to all school boards of the nation, "to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools," is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes. It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation.

It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions. If with no surer legal guidance we are to take up and decide every variation of this controversy, raised by persons not subject to penalty or tax but who are dissatisfied with the way schools are dealing with the problem, we are likely to have much business of the sort. And, more importantly, we are likely to make the legal "wall of separation between church and state" as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.

SUPREME COURT OF THE UNITED STATES

No. 90.—October Term, 1947.

People of the State of Illinois ex rel. Vashti McCollum, Appellant, *v.* Board of Education of School District No. 71, Champaign County, Illinois et al. | Appeal from the Supreme Court of the State of Illinois.

[March 8, 1948.]

Mr. Justice Reed, dissenting.

The decisions reversing the judgment of the Supreme Court of Illinois interpret the prohibition of the First Amendment against the establishment of religion, made effective as to the states by the Fourteenth Amendment, to forbid pupils of the public schools electing, with the approval of their parents, courses in religious education. The courses are given, under the school laws of Illinois as approved by the Supreme Court of that state, by lay or clerical teachers supplied and directed by an interdenominational local council of religious education.[1] The classes are held in the respective school buildings of the pupils at study or released time periods so as to avoid conflict with recitations. The teachers and supplies are paid for by the interdenominational group.[2] As I am

[1] The trial court found that: "'The Champaign Council of Religious Education' [is] a voluntary association made up of the representatives of the Jewish, Roman Catholic and Protestant faiths in the school district."

[2] There is no extra cost to the state but as a theoretical accounting problem it may be correct to charge to the classes their comparable proportion of the state expense for buildings, operation and teachers. In connection with the classes, the teachers need only keep a record

convinced that this interpretation of the First Amendment is erroneous, I feel impelled to express the reasons for my disagreement. By directing attention to the many instances of close association of church and state in American society and by recalling that many of these relations are so much a part of our tradition and culture that they are accepted without more, this dissent may help in an appraisal of the meaning of the clause of the First Amendment concerning the establishment of religion and of the reasons which lead to the approval or disapproval of the judgment below.

The reasons for the reversal of the Illinois judgment, as they appear in the respective opinions may be summarized by the following excerpts. The opinion of the Court after stating the facts, says: "The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education . . . . And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson* v. *Board of Education*, 330 U. S. 1." Another opinion phrases it thus: "We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid 'released time' program. We find that the basic Constitutional principle of absolute separation was violated when the State of Illinois, speaking by its Supreme Court, sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational ar-

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of the pupils who attend. Increased custodial requirements are likewise nominal. It is customary to use school buildings for community activities when not needed for school purposes. See Ill. Rev. Stat., ch. 122, § 123.

rangement." These expressions in the decisions seem to leave open for further litigation variations from the Champaign plan. Actually, however, future cases must run the gantlet not only of the judgment entered but of the accompanying words of the opinions. I find it difficult to extract from the opinions any conclusion as to what it is in the Champaign plan that is unconstitutional. Is it the use of school buildings for religious instruction; the release of pupils by the schools for religious instruction during school hours; the so-called assistance by teachers in handing out the request cards to pupils, in keeping lists of them for release and records of their attendance; or the action of the principals in arranging an opportunity for the classes and the appearance of the Council's instructors? None of the reversing opinions say whether the purpose of the Champaign plan for religious instruction during school hours is unconstitutional or whether it is some ingredient used in or omitted from the formula that makes the plan unconstitutional.

From the tenor of the opinions I conclude that their teachings are that any use of a pupil's school time whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban. I reach this conclusion notwithstanding one sentence of indefinite meaning in the second opinion: "We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial." The use of the words "cooperation," "fusion," "complete hands-off," "integrate" and "integrated" to describe the relations between the school and the Council in the plan evidences this. So does the interpretation of the word "aid." The criticized "momentum of the whole school atmosphere,"

"feeling of separatism" engendered in the non-participating sects, "obvious pressure . . . to attend," and "divisiveness" lead to the stated conclusion. From the holding and the language of the opinions, I can only deduce that religious instruction of public school children during school hours is prohibited. The history of American education is against such an interpretation of the First Amendment.

The opinions do not say in words that the condemned practice of religious education is a law respecting an establishment of religion contrary to the First Amendment. The practice is accepted as a state law by all. I take it that when the opinion of the Court says that "The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects" and concludes "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith," the intention of its author is to rule that this practice is a law "respecting an establishment of religion." That was the basis of *Everson* v. *Board of Education*, 330 U. S. 1. It seems obvious that the action of the School Board in permitting religious education in certain grades of the schools by all faiths did not prohibit the free exercise of religion. Even assuming that certain children who did not elect to take instruction are embarrassed to remain outside of the classes, one can hardly speak of that embarrassment as a prohibition against the free exercise of religion. As no issue of prohibition upon the free exercise of religion is before us, we need only examine the School Board's action to see if it constitutes an establishment of religion.

The facts, as stated in the reversing opinions, are adequately set out if we interpret the abstract words used in the light of the concrete incidents of the record. It is

correct to say that the parents "consented" to the religious instruction of the children, if we understand "consent" to mean the signing of a card like the one in the margin.[3] It is correct to say that "instructors were subject to the approval and supervision of the superintendent of schools," if it is understood that there were no definitive written rules and that the practice was as is shown in the excerpts from the findings below.[4] The substance of the

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[3] "CHAMPAIGN COUNCIL OF RELIGIOUS EDUCATION
1945–1946

Parent's Request Card

Please permit .... in Grade .. at .....
School to attend a class in Religious Education one period a week under the Auspices of the Champaign Council of Religious Education.

(Check which)
Date ....
( ) Interdenominational
( ) Protestant
( ) Roman Catholic
( ) Jewish

Signed .....
(Parent Name)

Parent's Church .....
Telephone No. .... Address .....

A fee of 25 cents a semester is charged each pupil to help cover the cost of material used.

If you wish your child to receive religious instruction, please sign this card and return to the school.

Mae Chapin, Director."

Mae Chapin, the Director, was not a school employee.

[4] "The superintendent testified that Jehovah's Witnesses or any other sect would be allowed to teach provided their teachers had proper educational qualifications, so that bad grammar, for instance, would not be taught to the pupils. A similar situation developed with reference to the Missouri Synod of the Lutheran Church. The evidence tends to show that during the course of the trial that group indicated it would affiliate with the Council of Religious Education.

"Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public

religious education course is determined by the members of the various churches on the council, not by the superintendent.[5] The evidence and findings set out in the two preceding notes convince me that the "approval and supervision" referred to above are not of the teachers and the course of studies but of the orderly presentation of the courses to those students who may elect the instruction. The teaching largely covered Biblical incidents.[6] The religious teachers and their teachings, in every real sense,

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school buildings said faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system.

"The court feels from all the facts in the record that an honest attempt has been made and is being made to permit religious instruction to be given by qualified outside teachers of any sect to people of their own faith in the manner above outlined. The evidence shows that no sect or religious group has ever been denied the right to use the schools in this manner."

[5] A finding reads: "The curriculum of studies in the Protestant classes is determined by a committee of the Protestant members of the council of religious education after consultation with representatives of all the different faiths included in said council. The Jewish classes of course would deny the divinity of Jesus Christ. The teaching in the Catholic classes of course explains to Catholic pupils the teaching of the Catholic religion, and are not shared by other students who are Protestants or Jews. The teachings in the Protestant classes would undoubtedly, from the evidence, teach some doctrines that would not be accepted by the other two religions."

[6] It was found: "The testimony shows that sectarian differences between the sects are not taught or emphasized in the actual teaching as it is conducted in the schools. The testimony of the religious education teachers, the secular teachers who testified, and the many children, mostly from Protestant families, who either took or did not take religious education courses, is to the effect that religious education classes have fostered tolerance rather than intolerance."

The Supreme Court of Illinois said: "The religious education courses do not go to the extent of being worship services and do not include prayers or the singing of hymns." 396 Ill. 14, 21.

were financed and regulated by the Council of Religious Education, not the School Board.

The phrase "an establishment of religion" may have been intended by Congress to be aimed only at a state church. When the First Amendment was pending in Congress in substantially its present form, "Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." [7] Passing years, however, have brought about acceptance of a broader meaning, although never until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion as an optional, extracurricular subject during released school time in public school buildings, was equivalent to an establishment of religion. A reading of the general statements of eminent statesmen of former days, referred to in the opinions in this and *Everson* v. *Board of Education, supra,* will show that circumstances such as those in this case were far from the minds of the authors. The words and spirit of those statements may be wholeheartedly accepted without in the least impugning the judgment of the State of Illinois.[8]

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[7] 1 Annals of Congress 730.

[8] For example, Mr. Jefferson's striking phrase as to the "wall of separation between church and State" appears in a letter acknowledging "the affectionate sentiments of esteem and approbation" included in a testimonial to himself. In its context it read as follows:

"Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that

Mr. Jefferson, as one of the founders of the University of Virginia, a school which from its establishment in 1819 has been wholly governed, managed and controlled by the State of Virginia,[9] was faced with the same problem that is before this Court today: the question of the constitutional limitation upon religious education in public schools. In his annual report as Rector, to the President and Directors of the Literary Fund, dated October 7, 1822, approved by the Visitors of the University of whom Mr. Madison was one,[10] Mr. Jefferson set forth his views at some length.[11] These suggestions of Mr. Jefferson were

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their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." 8 The Writings of Thomas Jefferson (Washington ed., 1861) 113.

[9] Acts of the Assembly of 1818–19 (1819) 15; *Phillips* v. *The Rector and Visitors of the University of Virginia*, 97 Va. 472, 474–75.

[10] 19 The Writings of Thomas Jefferson (Memorial edition, 1904) 408, 409.

[11] *Id.*, pp. 414–17:

"It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences . . . . A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science . . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for the

adopted [12] and ch. II, § 1, of the Regulations of the University of October 4, 1824, provided that:

> "Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour." [13]

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religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. Such establishments would offer the further and greater advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected, and destined to that purpose under impartial regulations, as proposed in the same report of the commissioners, or in the lecturing room of such professor . . . . Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion, the most inalienable and sacred of all human rights, over which the people and authorities of this state, individually and publicly, have ever manifested the most watchful jealousy: and could this jealousy be now alarmed, in the opinion of the legislature, by what is here suggested, the idea will be relinquished on any surmise of disapprobation which they might think proper to express."

Mr. Jefferson commented upon the report on November 2, 1822, in a letter to Dr. Thomas Cooper, as follows: "And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality." 12 Ford, *The Works of Thomas Jefferson*, (Fed. ed., 1905), 272.

[12] 3 Randall, Life of Thomas Jefferson (1858) 471.

[13] 19 The Writings of Thomas Jefferson (Memorial edition, 1904) 449.

Thus, the "wall of separation between church and State" that Mr. Jefferson built at the University which he founded did not exclude religious education from that school. The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.

Mr. Madison's *Memorial and Remonstrance against Religious Assessments*[14] relied upon by the dissenting Justices in *Everson* is not applicable here.[15] Mr. Madison was one of the principal opponents in the Virginia General Assembly of *A Bill Establishing a Provision for Teachers of the Christian Religion*. The monies raised by the taxing section[16] of that bill were to be appropriated "by the Vestries, Elders, or Directors of each religious society, . . . to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing

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[14] The texts of the *Memorial and Remonstrance* and the bill against which it was aimed, to wit, *A Bill Establishing a Provision for Teachers of the Christian Religion* are set forth in *Everson* v. *Board of Education*, 330 U. S. 1, 28, 63–74.

[15] See, generally, the dissent of MR. JUSTICE RUTLEDGE, 330 U. S. 1, 28.

[16] 330 U. S. at 72–73:

"*Be it therefore enacted by the General Assembly*, That for the support of Christian teachers, per centum on the amount, or in the pound on the sum payable for tax on the property within this Commonwealth, is hereby assessed, and shall be paid by every person chargeable with the said tax at the time the same shall become due; and the Sheriffs of the several Counties shall have power to levy and collect the same in the same manner and under the like restrictions and limitations, as are or may be prescribed by the laws for raising the Revenues of this State.

"*And be it enacted*, That for every sum so paid, the Sheriff or Collector shall give a receipt, expressing therein to what society of Christians the person from whom he may receive the same shall direct the money to be paid, keeping a distinct account thereof in his books . . . ."

places of divine worship, and to none other use whatsoever . . . ." The conclusive legislative struggle over this act took place in the fall of 1785 before the adoption of the Bill of Rights. The *Remonstrance* had been issued before the General Assembly convened and was instrumental in the final defeat of the act which died in committee. Throughout the *Remonstrance*, Mr. Madison speaks of the "establishment" sought to be effected by the act. It is clear from its historical setting and its language that the *Remonstrance* was a protest against an effort by Virginia to support Christian sects by taxation. Issues similar to those raised by the instant case were not discussed. Thus, Mr. Madison's approval of Mr. Jefferson's report as Rector gives, in my opinion, a clearer indication of his views on the constitutionality of religious education in public schools than his general statements on a different subject.

This Court summarized the amendment's accepted reach into the religious field, as I understand its scope, in *Everson* v. *Board of Education, supra.* The Court's opinion quotes the gist of the Court's reasoning in *Everson.* I agree as there stated that none of our governmental entities can "set up a church." I agree that they cannot "aid" all or any religions or prefer one "over another." But "aid" must be understood as a purposeful assistance directly to the church itself or to some religious group or organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions. "Prefer" must give an advantage to one "over another." I agree that pupils cannot "be released in part from their legal duty" of school attendance upon condition that they attend religious classes. But as Illinois has held that it is within the discretion of the School Board to permit absence from school for religious instruction no legal duty of school attendance is violated. 396 Ill. 14. If the sentence in the Court's opinion, concerning the pupils' release from legal duty, is intended to mean

that the Constitution forbids a school to excuse a pupil from secular control during school hours to attend voluntarily a class in religious education, whether in or out of school buildings, I disagree. Of course, no tax can be levied to support organizations intended "to teach or practice religion." I agree too that the state cannot influence one toward religion against his will or punish him for his beliefs. Champaign's religious education course does none of these things.

It seems clear to me that the "aid" referred to by the Court in the *Everson* case could not have been those incidental advantages that religious bodies, with other groups similarly situated, obtain as a by-product of organized society. This explains the well-known fact that all churches receive "aid" from government in the form of freedom from taxation. The *Everson* decision itself justified the transportation of children to church schools by New Jersey for safety reasons. It accords with *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370, where this Court upheld a free textbook statute of Louisiana against a charge that it aided private schools on the ground that the books were for the education of the children, not to aid religious schools. Likewise the National School Lunch Act aids all school children attending tax exempt schools.[17] In *Bradfield* v. *Roberts*, 175 U. S. 291, this Court held proper the payment of money by the Federal Government to build an addition to a hospital, chartered by individuals who were members of a Roman Catholic sisterhood, and operated under the auspices of the Roman Catholic Church. This was done over the objection that it aided the establishment of religion.[18] While obviously in these instances the respective churches, in a certain sense, were aided, this

[17] 60 Stat. ch. 281, §§ 4, 11 (d) (3).

[18] See *Selective Draft Law Cases*, 245 U. S. 366, 390; *Quick Bear* v. *Leupp*, 210 U. S. 50.

Court has never held that such "aid" was in violation of the First or Fourteenth Amendments.

Well-recognized and long-established practice support the validity of the Illinois statute here in question. That statute, as construed in this case, is comparable to those in many states.[19] All differ to some extent. New York may be taken as a fair example.[20] In many states the pro-

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[19] Ed. Code of Cal. (Deering, 1944) § 8286; 6 Ind. Stat. Ann. (Burns, 1934) 1945 Supp. § 28–505a; 1 Code of Iowa ch. 299, § 299.2 (1946); Ky. Rev. Stat. (1946) § 158.220; 1 Rev. Stat. of Maine (1944) ch. 37, § 131; 2 Ann. Laws of Mass. (1945) ch. 76, § 1; Minn. Stat. (1945) § 132.05; N. Y. Education Law, § 3210 (1); 8 Ann. Laws of Oreg. (1940) § 111–3014; 24 Pa. Stat. Ann. (Purdon, 1930) 1947 Supp. § 1563; 1 Code of S. D. (1939) § 15.3202; 1 Code of W. Va. (1943) § 1847.

[20] Education Law § 3210 (1) provides that: "a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

"b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

Acting under the authority of the New York law the State Commissioner of Education issued, on July 4, 1940, these regulations:

"1 Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

"2 The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

"3 Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4 Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5 Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

"6 In the event that more than one school for religious observance and education is maintained in any district, the hour for absence

gram is under the supervision of a religious council composed of delegates who are themselves communicants of various faiths.[21] As is shown by *Bradfield* v. *Roberts*, *supra*, the fact that the members of the council have religious affiliations is not significant. In some, instruction is given outside of the school buildings; in others, within these buildings. Metropolitan centers like New York usually would have available quarters convenient to schools. Unless smaller cities and rural communities use the school building at times that do not interfere with

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for each particular public school in such district shall be the same for all such religious schools."

On November 13, 1940, rules to govern the released time program of the New York City schools were adopted by the Board of Education of the City of New York. Under these rules the practice of the religious education program is this: classes in religious education are to be held outside of school buildings; establishment of the program rests in the initiative of the church and home; enrollment is voluntary and accomplished by this technique: the church distributes cards to the parents and these are filled out and presented to the school; records of enrollment and arrangements for release are handled by school authorities; discipline is the responsibility of the church; and children who do not attend are kept at school and given other work. See Rules of the Board of Education of the City of New York adopted Nov. 13, 1940; Public Education Association, *Released Time for Religious Education in New York City Schools* (1943); *id.* (1945).

Constitutional approval by the New York Court of Appeals of these practices was given before the passage of Education Law § 3210 (1). *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195.

[21] The New York City program is supervised by The Greater New York Coordinating Committee on Released Time, a group of laymen drawn from Jews, Protestants and Roman Catholics. This Committee is an example of a broad national effort to bring about religious education of children through cooperative action of schools and groups of members of various religious denominations. The methods vary in different states and cities but are basically like the work of the New York City Committee. See *Brief Sketches of Weekday Church Schools*, Department of Weekday Religious Education, International Council of Religious Education, Chicago, Illinois (1944).

recitations, they may be compelled to give up religious education. I understand that pupils not taking religious education usually are given other work of a secular nature within the schools.[22] Since all these states use the facilities of the schools to aid the religious education to some extent, their desire to permit religious education to school children is thwarted by this Court's judgment.[23] Under it, as I understand its language, children cannot be released or dismissed from school to attend classes in religion while other children must remain to pursue secular education. Teachers cannot keep the records as to which pupils are to be dismissed and which retained. To do so is said to be an "aid" in establishing religion; the use of public money for religion.

Cases running into the scores have been in the state courts of last resort that involved religion and the schools. Except where the exercises with religious significance partook of the ceremonial practice of sects or groups, their constitutionality has been generally upheld.[24] Illinois

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[22] See note 20 *supra*.

[23] The use of school buildings is not unusual. See Davis, *Weekday Classes in Religious Education*, U. S. Office of Education (Bulletin 1941, No. 3) 27; National Education Association, *The State and Sectarian Education*, Research Bulletin (Feb. 1946) 36. The International Council of Religious Education advises that church buildings be used if possible. Shaver, *Remember the Weekday*, International Council of Religious Education (1946).

"Today, approximately two thousand communities in all but two states provide religious education in cooperation with the public schools for more than a million and a half of pupils." Shaver, *The Movement for Weekday Religious Education*, Religious Education (Jan.-Feb. 1946).

[24] Many uses of religious material in the public schools in a manner that has some religious significance have been sanctioned by state courts. These practices have been permitted: reading selections from the King James Bible without comment; reading the Bible and repeating the Lord's Prayer; teaching the Ten Commandments; saying prayers; and using textbooks based upon the Bible and

itself promptly struck down as violative of its own constitution required exercises partaking of a religious ceremony. *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334. In that case compulsory religious exercises—a reading from the King James Bible, the Lord's Prayer and the singing of hymns—were forbidden as "worship services." In this case, the Supreme Court of Illinois pointed out that in the *Ring* case, the activities in the school were ceremonial and compulsory; in this, voluntary and educational. 396 Ill. 14, 20–21.

The practices of the federal government offer many examples of this kind of "aid" by the state to religion. The Congress of the United States has a chaplain for each House who daily invokes divine blessings and guidance for the proceedings.[25] The armed forces have commissioned chaplains from early days.[26] They conduct the public services in accordance with the liturgical requirements of their respective faiths, ashore and afloat, employing for the purpose property belonging to the United States and dedicated to the services of religion.[27] Under the Service-

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emphasizing its fundamental teachings. When conducted in a sectarian manner reading from the Bible and singing hymns in the school's morning exercise have been prohibited as has using the Bible as a textbook. There is a conflict of authority on the question of the constitutionality of wearing religious garb while teaching in the public schools. It has been held to be constitutional for school authorities to prohibit the reading of the Bible in the public schools. There is a conflict of authority on the constitutionality of the use of public school buildings for religious services held outside of school hours. The constitutionality, under state constitutions, of furnishing free textbooks and free transportation to parochial school children is in conflict. See *Nichols* v. *Henry*, 301 Ky. 434; *Findley* v. *City of Conneaut*, 12 Ohio Supp. 161. The earlier cases are collected in 5 A. L. R. 866 and 141 A. L. R. 1144.

[25] Rules of the House of Representatives (1943) Rule VII; Senate Manual (1947) 6, fn. 2.

[26] 3 Stat. 297 (1816).

[27] Army Reg., No. 60-5 (1944); U. S. Navy Reg. (1920), ch. 1, § 2 and ch. 34, §§ 1–2.

men's Readjustment Act of 1944, eligible veterans may receive training at government expense for the ministry in denominational schools.[28] The schools of the District of Columbia have opening exercises which "include a reading from the Bible without note or comment, and the Lord's prayer."[29]

In the United States Naval Academy and the United States Military Academy, schools wholly supported and completely controlled by the federal government, there are a number of religious activities. Chaplains are attached to both schools. Attendance at church services on Sunday is compulsory at both the Military and Naval Academies.[30] At West Point the Protestant services are held in the Cadet Chapel, the Catholic in the Catholic Chapel, and the Jewish in the Old Cadet Chapel; at Annapolis only Protestant services are held on the reservation, midshipmen of other religious persuasions attend the churches of the city of Annapolis. These facts indicate that both schools since their earliest beginnings have maintained and enforced a pattern of participation in formal worship.

With the general statements in the opinions concerning the constitutional requirement that the nation and the states, by virtue of the First and Fourteenth Amend-

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[28] 58 Stat. 289.

[29] Board of Education Rules, ch. VI, § 4.

[30] Reg. for the U. S. Corps of Cadets (1947) 47: "Attendance at chapel is part of a cadet's training; no cadet will be exempted. Each cadet will receive religious training in one of the three principal faiths: Catholic, Protestant, or Jewish." U. S. Naval Academy Reg., Art. 4301 (b): "(b) Midshipmen shall attend church services on Sundays at the Naval Academy Chapel or at one of the regularly established churches in the city of Annapolis."

Morning prayers are also required at Annapolis. U. S. Naval Academy Reg., Art. 4301 (a): "Daily, except on Sundays, a Chaplain will conduct prayers in the messhall, immediately before breakfast." Protestant and Catholic Chaplains take their turn in leading these prayers.

ments,[31] may "make no law respecting an establishment of religion," I am in agreement. But, in the light of the meaning given to those words by the precedents, customs, and practices which I have detailed above, I cannot agree with the Court's conclusion that when pupils compelled by law to go to school for secular education are released from school so as to attend the religious classes, churches are unconstitutionally aided. Whatever may be the wisdom of the arrangement as to the use of the school buildings made with The Champaign Council of Religious Education, it is clear to me that past practice shows such cooperation between the schools and a non-ecclesiastical body is not forbidden by the First Amendment. When actual church services have always been permitted on government property, the mere use of the school buildings by a non-sectarian group for religious education ought not to be condemned as an establishment of religion. For a non-sectarian organization to give the type of instruction here offered cannot be said to violate our rule as to the establishment of religion by the state. The prohibition of enactments respecting the establishment of religion do not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together any more than the other provisions of the First Amendment—free speech, free press—are absolutes.[32] If abuses occur such as the use of the instruction hour for sectarian purposes, I have no doubt, in view of the *Ring* case, that Illinois will

[31] The principles of the First Amendment were absorbed by the Fourteenth Amendment. *Pennekamp* v. *Florida*, 328 U. S. 331, 335.

[32] See *Whitney* v. *California*, 274 U. S. 357, 371; *Reynolds* v. *United States*, 98 U. S. 145, 166; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Cox* v. *New Hampshire*, 312 U. S. 569, 574, 576; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571; *Prince* v. *Massachusetts*, 321 U. S. 158.

promptly correct them. If they are of a kind that tend to the establishment of a church or interfere with the free exercise of religion, this Court is open for a review of any erroneous decision. This Court cannot be too cautious in upsetting practices embedded in our society by many years of experience. A state is entitled to have great leeway in its legislation when dealing with the important social problems of its population.[33] A definite violation of legislative limits must be established. The Constitution should not be stretched to forbid national customs in the way courts act to reach arrangements to avoid federal taxation.[34] Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. This is an instance where, for me, the history of past practices is determinative of the meaning of a constitutional clause not a decorous introduction to the study of its text. The judgment should be affirmed.

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[33] Cf. *Bob-Lo Excursion Co.* v. *Michigan*, — U. S. —.

[34] *Higgins* v. *Smith*, 308 U. S. 473; *Helvering* v. *Clifford*, 309 U. S. 331; *Comm'r* v. *Tower*, 327 U. S. 280; *Lusthaus* v. *Comm'r*, 327 U. S. 293.